(P)

No. 88-1916-CSY
Status: GRANTED

Title: Minnesota, Petitioner
v.
Robert Darren Olson

Docketed:
May 26, 1989

Court: Supreme Court of Minnesota

Counsel for petitioner: Peek,Anne E.

Counsel for respondent: Bruder,Glenn P.

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | May 26 1989 | G | Petition for writ of certiorari filed. |
| 2 | Jun 22 1989 | D | Application (A88-1033) for a stay pending the disposition of a petition for a writ of certiorari, submitted to Justice Blackmun. |
| 4 | Jun 23 1989 | | Application (A88-1033) denied by Justice Blackmun. |
| 5 | Jun 23 1989 | | Brief amici curiae of Connecticut, et al. filed. |
| 6 | Jun 23 1989 | | Brief of respondent Olson in opposition filed. |
| 7 | Jun 27 1989 | | DISTRIBUTED. September 25, 1989 |
| 8 | Oct 2 1989 | | Petition GRANTED. |
| | | | ********** |
| 9 | Oct 16 1989 | | Record filed. |
| | | * | Certified copy of original record received. |
| 10 | Nov 2 1989 | | Joint appendix filed. |
| 11 | Nov 13 1989 | G | Motion of respondent for leave to proceed further herein in forma pauperis filed. |
| 12 | Nov 13 1989 | G | Motion of respondent for appointment of counsel filed. |
| 13 | Nov 15 1989 | | DISTRIBUTED. DEC. 1, 1989. (Motion of respondent for leave to proceed further herein in forma pauperis and also motion of respondent for appointment of counsel). |
| 14 | Nov 16 1989 | | Brief amicus curiae of United States filed. |
| 15 | Nov 16 1989 | | Brief amici curiae of Connecticut, et al. filed. |
| 16 | Nov 17 1989 | | Brief of petitioner Minnesota filed. |
| 19 | Dec 1 1989 | G | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. |
| 17 | Dec 4 1989 | | Motion of respondent for leave to proceed further herein in forma pauperis GRANTED. |
| 18 | Dec 4 1989 | | Motion for appointment of counsel GRANTED and it is ordered that Glenn P. Bruder, Esquire, of Edina, Minnesota, is appointed to serve as counsel for the respondent in this case. |
| 20 | Dec 15 1989 | | Brief of respondent Olson filed. |
| 21 | Dec 27 1989 | D | Motion of Connecticut, et al. for leave to participate in oral argument as amici curiae, for divided argument and for additional time for oral argument filed. |
| 24 | Jan 5 1990 | | CIRCULATED. |
| 25 | Jan 5 1990 | | SET FOR ARGUMENT MONDAY, FEBRUARY 26, 1990. (3RD CASE) |
| 22 | Jan 8 1990 | | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. |
| 23 | Jan 8 1990 | | Motion of Connecticut, et al. for leave to participate in oral argument as amici curiae, for divided argument and for additional time for oral argument DENIED. |

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No. 88-1916-CSY

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 26 | Jan 12 1990 | X | Reply brief of petitioner Minnesota filed. |
| 27 | Feb 26 1990 | | ARGUED. |

88-1916

No. 89-____



IN THE

# Supreme Court of the United States

October Term, 1988

STATE OF MINNESOTA,

*Petitioner,*

vs.

ROBERT DARREN OLSON,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

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## QUESTIONS PRESENTED

1. After successfully eluding the police following an armed robbery and murder, defendant sleeps overnight on the floor at a friend's home. He has no key to the home, is never left alone there and has no possessions other than a few extra clothes in a bag. Does defendant have a legitimate expectation of privacy in the friend's home to enable him to challenge his warrantless arrest there under the Fourth and Fourteenth Amendments to the United States Constitution?

2. At 2:00 p.m. on a Sunday the police establish probable cause to believe defendant is an accomplice in an aggravated robbery and murder that occurred the day before. Police also have reason to believe that defendant is temporarily staying in a particular duplex; that he may be armed; and that he may be preparing to flee. Approximately an hour later, when police learn that defendant and his friends are present at that address, they surround the duplex. They telephone into the duplex and confirm defendant's presence and his refusal to come out. Under these circumstances, must police continue to stake out the building while obtaining a warrant, or is an immediate warrantless entry to arrest justified by exigent circumstances under the Fourth and Fourteenth Amendments to the United States Constitution?

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IN THE

# Supreme Court of the United States

October Term, 1988

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No. ———

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STATE OF MINNESOTA,

*Petitioner,*

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ROBERT DARREN OLSON,

*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

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The Hennepin County Attorney, on behalf of the State of Minnesota, respectfully petitions for a writ of certiorari to review the judgment of the Minnesota Supreme Court entered in this proceeding on February 24, 1989.

## OPINIONS BELOW

The opinion of the Minnesota Supreme Court, reproduced and attached to this Petition as Appendix A, is reported at 436 N.W.2d 92 (Minn. 1989). The opinion of the Hennepin County District Court, reproduced and attached to this Petition as Appendix C, is unreported.

## STATEMENT OF JURISDICTIONAL GROUNDS

The judgment of the Minnesota Supreme Court was entered on February 24, 1989. The State filed a timely Petition for Rehearing, which is reproduced and attached to this Petition as Appendix D, on March 6, 1989. The Minnesota Supreme Court's summary denial of that Petition for Rehearing, reproduced and attached to this Petition as Appendix B, was filed on March 28, 1989. This petition for a writ of certiorari was filed within sixty days of the court's denial of rehearing.

The jurisdiction of this court is invoked under 28 U.S.C. §1257(a) (1989).

## CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution:

. . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . ."



## STATEMENT OF THE CASE

On Saturday morning, July 18, 1987 a lone gunman entered a gas station in Minneapolis with an automatic weapon. Without a word, the man shot the young manager of the store in the back of the head. Then he robbed the other three employees of the station at gunpoint. Police were quickly alerted. Because the description of the robber fit Joseph Ecker, a man suspected of committing several robberies in the area, police officers went to Ecker's home within minutes of the robbery/murder. A brown Oldsmobile pulled up at Ecker's home at the same time as the police car. When the driver saw the squad car, he put his car in reverse and sped backwards; the car spun out of control and came to a stop. The driver and one other male jumped out of the car and fled on foot. Officers gave chase and quickly arrested Joseph Ecker, the passenger of the car, inside his home. The other man escaped. Ecker was later identified as the gunman who entered the station to commit the crime.

Inside the abandoned Oldsmobile police found the stolen money and the murder weapon, as well as various documents linking Respondent Robert Darren Olson to the car. They also found in the car a pellet gun in the shape of a revolver, a knife, a knife sheath and two empty shoulder holsters for handguns (R.85, 99; T.224, 341, 345, 369-70).[1]

Police continued to investigate. On the morning of the next day, Sunday, police received a tip that a man named "Rob" was the driver of the getaway car and was planning to leave town by bus (R.110-12, 129). Police officers were dispatched to the bus depot (R.129-130). At noon the tipster called again.

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[1] "R" refers to the transcript of the pretrial ("Rasmussen") hearing. "T" refers to the trial transcript.

She identified herself[2] to Sgt. DeConcini, the investigating officer, and told him that "Maria," who lived on Garfield Avenue N.E., had told her that "Rob" had admitted to her (Maria) and to "Louann and Julie" at 2406 Fillmore Avenue N.E. that he was the driver for the gas station robbery and murder (R.113-14, 122). Police officers went to 2406 Fillmore, a duplex, to try to verify the tip (R.114, 132, 148-50). They were unable to find Louann or Julie, but the person living in the lower portion of the duplex identified herself as Louann's mother and verified that Louann and Julie Bergstrom lived upstairs. She told police that Respondent had been staying with Louann and Julie for a day or so, but that they were not home now. She agreed to call police when they returned (R.114-115, 132-33, 142-44, 147, 148-50).

At 2:00 p.m., shortly after he received this information, Sgt. DeConcini issued a "pickup order" for Respondent (R.115-117, 131; T.430). He did not attempt to get an arrest warrant (R.129).[3] He instructed his officers to stay away from the duplex until he received the call that Respondent had returned.

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[2] The actual identity of the informant is unknown. The woman identified herself as "Diana Murphy" and gave an address and telephone number (R.113). A woman named Diana Humphrey, whose address and telephone number matched that given by the tipster, testified that she knew Louann and Julie but that she did not call the police (R.168-176).

[3] Rules 2 and 3 of the Minnesota Rules of Criminal Procedure provide that an arrest warrant must be combined with a criminal complaint, which requires a county attorney's signature as well as judicial approval. 49 Minn. Stat. Ann.R.Cr.P. 2, 3. Sgt. DeConcini testified he did not attempt to obtain a warrant because it was Sunday, the county attorney's office was not open, and the tip gave him reason to believe that Respondent intended to flee (R.116, 129). He stated he did not know how long it would take to obtain an arrest warrant/complaint on Sunday in Hennepin County because he had never tried to obtain one on a weekend (R.130).



At approximately 2:45 p.m. the downstairs resident called and told DeConcini that Respondent and the others had returned (R.117-18). DeConcini ordered his officers to surround the home. After they arrived, but before they tried to enter, DeConcini called the home. A woman who identified herself as "Julie" answered the telephone. DeConcini told her to tell Respondent to come out of the house, that police were waiting for him. There was a pause, and then DeConcini heard a male voice in the background saying, "tell them I left." Julie came back on the phone and said "[Respondent] has left already" (R.118, 124; T.431, 433-34). DeConcini then directed the officers to enter the house.[4] They found Respondent hiding behind furniture and toys in the back of a small closet on the third floor attic of the building (R.118, 139-41; T.408-411). He was then arrested, and shortly after 3:00 p.m. police obtained a statement from him, in which he admitted driving Ecker to and from the crime scene but denied any involvement in the crime (R.157-163; T.379-396).[5]

In August 1987 Respondent and Joseph Ecker were indicted by a Hennepin County, Minnesota grand jury on charges of

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[4] There is no dispute that police entered with guns drawn. In his Reply to the State's Petition for Rehearing Respondent characterized the police entry as a "storming of a dwelling" and quoted portions of Julie Bergstrom's testimony at the pretrial hearing in which she claimed to have been mistreated by police. Her testimony, however, was not supported by that of her mother, Julie's boyfriend or the police officers, and the trial court did not make such a finding of excessive force or mistreatment (*See* R.137-38, 145-46, 182-192, 208-211 and Appendix C at A-16-19.)

[5] Subsequent police investigation revealed that the car used in the crime belonged to Appellant and that the murder weapon probably also belonged to Appellant (T.390, 475-500, 507-08).

first degree felony murder, aggravated robbery and second degree assault.[6]

At a pretrial hearing Respondent moved to suppress his post arrest statement on the grounds that his warrantless arrest violated the Fourth and Fourteenth Amendments of the United States Constitution (*See* Appendix C). Respondent argued that he had a legitimate expectation of privacy in the Bergstrom duplex and therefore the warrantless police entry to arrest him violated the principles set forth in *Payton v. New York*, 445 U.S. 573 (1980).[7] The State argued in response that Respondent lacked the necessary "standing" to contest the legality of his arrest and that in any event exigent circumstances justified the warrantless arrest.

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[6] Minnesota Statutes §609.185 (3) (1987) provided in relevant part:
Whoever does any of the following is guilty of murder in the first degree and shall be sentenced to imprisonment for life:

* * * * *

(3) causes the death of a human being with intent to effect the death of the person or another, while committing or attempting to commit . . . aggravated robbery. . . . .

Minnesota Statutes § 609.245 (1987) provided as follows:
Whoever, while committing a robbery, is armed with a dangerous weapon or inflicts bodily harm upon another is guilty of aggravated robbery and may be sentenced to imprisonment for not more than 20 years or to payment of a fine of not more than $35,000 or both.

Minnesota Statutes §609.222 (1987) provides as follows:
Whoever assaults another with a dangerous weapon may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both.

[7] Respondent also claimed that to the extent the police relied on information from a "fictitious informant," they lacked sufficient probable cause to arrest under the Fourth and Fourteenth Amendments to the United States Constitution. The trial court found that the information provided by the informant was sufficiently corroborated to justify police reliance, and that the tip, as well as the other incriminating evidence found in the getaway car, provided sufficient probable cause for Respondent's arrest (Appendix C at A-22-25). On appeal the Minnesota Supreme Court discussed, but did not reach, the issue of probable cause to arrest (Appendix A at A-5-7).



Testimony presented at the hearing revealed the following facts with respect to Respondent's connection with the duplex: Respondent had been staying with Ecker at Ecker's home for at least ten days before the crime; after Respondent's narrow escape from police which resulted in Ecker's arrest in his home, Respondent did not wish to return there (R.220-21). Although they had not known him long, Julie Bergstrom and her mother, Louann, agreed to allow Respondent to stay with them for a day or two in their upper duplex (R.182, 184, 194-95, 198, 216). At the time of his arrest Respondent had slept on the floor for one night; also sharing the home that night was Julie's boyfriend (R.182, 189, 191, 208-09). Respondent had no legal interest in the duplex and did not have a key. Although he kept a few extra clothes in a bag at the home, he had no closet, dresser, or even a toothbrush, at the duplex (R.220). Julie Bergstrom testified that Respondent was free to come and go; however, during his overnight stay Respondent left the duplex when the other occupants left and returned only when the other occupants returned (R.183-84, 195, 216-17). The only evidence concerning Respondent's right to allow or refuse entry to visitors was as follows:

> Q. [by defense attorney]: And if somebody came over to see Mr. Olson, did he have your permission to admit them or refuse to admit them?
>
> A. [by Louann Bergstrom]: I don't know. It was never discussed.
>
> Q. Had somebody come over to visit Mr. Olson, would you have allowed him to decide if that person would visit with him?
>
> A. If I saw no reason not to.

(R.192).

The trial court denied Respondent's motion to suppress, finding that under these facts, Respondent had no reasonable expectation of privacy in the duplex and thus had no "standing" to contest his arrest. The court did not therefore reach the issue of whether exigent circumstances justified the warrantless arrest (Appendix C).

On February 11, 1988 Respondent was convicted as charged after a jury trial. Respondent appealed his conviction to the Minnesota Supreme Court, alleging numerous errors, including the legality of his warrantless arrest. Reaching only the issues of the legality of Respondent's warrantless arrest and his "standing" to raise the issue, the Minnesota Supreme Court reversed Respondent's conviction and remanded the case for a new trial on February 24, 1989 (Appendix A). The court held that as an overnight guest with permission to stay for an indefinite period and some authority to allow or refuse visitors entry, Respondent had a legitimate expectation of privacy in the duplex (Appendix A at A-7-9).[8]

The Minnesota Supreme Court then decided that the warrantless arrest was not justified by exigent circumstances because: a) Respondent was not the murderer but only his accomplice; b) the police had already recovered the murder weapon; c) Respondent had not yet left town; and d) the police should have obtained a warrant, either during the hour while they waited for Respondent's return to the duplex or while they had the house surrounded (Appendix A at A-9-13).

[8] Respondent has consistently argued that he had the authority to admit or refuse others entry; the State has consistently argued that the record does not support such a conclusion. The trial court did not explicitly find lack of authority to control, but such a finding is implicit in the trial court's order. The Minnesota Supreme Court implicitly held that the trial court's finding on this issue was clearly erroneous.



Because the court held that the arrest violated Respondent's federal Fourth Amendment rights, it suppressed Respondent's post arrest statement. The court found that the use of the statement at trial was not harmless error and remanded the case for a new trial. The State filed a timely Petition for Rehearing on March 6, 1989 (Appendix D at A-27-36), which was summarily denied by the Minnesota Supreme Court on March 28, 1989 (Appendix B at A-15).

## REASONS FOR GRANTING THE WRIT

### I. IN HOLDING THAT RESPONDENT HAD "STANDING" TO CONTEST HIS WARRANTLESS ARREST, THE MINNESOTA SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW IN A WAY WHICH CONFLICTS IN PRINCIPLE WITH APPLICABLE DECISIONS OF THIS COURT AND HAS THEREBY UNDULY BROADENED THE SCOPE OF THE FOURTH AMENDMENT.

The Minnesota Supreme Court held that, even though Respondent did not own or rent the duplex where he was arrested, had merely slept there on the floor one night, and had no possessions there except for a change of clothes, Respondent nevertheless had a reasonable expectation of privacy in the duplex because (1) he had permission to stay there for an indefinite period and (2) he had the right to allow or refuse visitors entry (Appendix A at A-7-9). The court relied on *Jones v. United States*, 362 U.S. 257 (1960) to support its holding, stating that "this case is quite similar to *Jones*" (Appendix A at A-8). In so holding, the Minnesota Supreme Court misapplied *Jones* and this court's subsequent Fourth Amendment "standing" cases, thereby greatly enlarging the class of

persons who may invoke the exclusionary rule for Fourth Amendment violations.

In *Jones v. United States*, 362 U.S. 257 (1960) this court held that anyone legitimately on the premises where a search occurs has standing to challenge the legality of the search. This court significantly narrowed the *Jones* holding, however, in *Rakas v. Illinois*, 439 U.S. 128 (1978):

> We think that Jones on its facts merely stands for the unremarkable proposition that a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place.

439 U.S. at 142. The court held that the correct inquiry was whether the challenger has a legitimate expectation of privacy in the area invaded. The court nevertheless affirmed the *Jones* result, holding that Jones did have a legitimate expectation of privacy in the apartment searched. Crucial to that decision was the fact that the owner of the apartment was away and that Jones had a key to the apartment. He could therefore come and go at will, and freely admit and exclude others: "Jones had complete domination and control over the apartment and could exclude others from it." *Rakas*, 439 U.S. at 149.

At first glance this case and *Jones* seem factually similar: Respondent and Jones were both overnight guests who carried with them only a change of clothes. There are, however, important factual differences between this case and *Jones* which the Minnesota Supreme Court overlooked: Respondent had far less control over his friend's home than did Jones. Respondent was never left alone in the duplex. The record indicates that he left the duplex when the other occupants of the dwelling left. He returned only when they returned. Respondent presented no evidence that he had the right to refuse entry to others, and the evidence with respect to admitting entry to others was qualified and vague (*See* R.192).[9] Nor did Respondent have a key to the duplex, a fact which, although not alone determinative, is extremely important to consider concerning whether he had control of the premises. When a host gives his guest a key to his house, he in effect says, "my home is your home," and in fact the guest can then come and go at will, exclude others, and completely control the premises, at least as long as the owner is absent. Because Respondent's control of the premises was minimal, a careful application of *Rakas* compels a finding that Respondent lacked a reasonable expectation of privacy in the duplex.



The Minnesota Supreme Court implicitly held that Respondent had a reasonable expectation of privacy in the entire premises. Several decisions of this court, however, suggest that the proper inquiry is whether he had a privacy interest not in the entire premises, but in the immediate area searched, i.e., the third floor attic closet in which he was found. *See United States v. Salvucci*, 448 U.S. 83, 95 (1980) (remanding to allow the defendants the opportunity to establish "that they had a legitimate expectation of privacy in the areas of [defendant's] mother's home where the goods were seized.");

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[9] The State contends that the Minnesota Supreme Court's conclusion regarding Respondent's right to admit or exclude others is clearly erroneous because it was not supported by the record. Furthermore, even if the record were subject to conflicting interpretations, the Minnesota Supreme Court apparently overlooked the fact that Respondent bears the burden of establishing that his personal Fourth Amendment rights have been violated. *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980); *Rakas v. Illinois*, 439 U.S. at 130-131, n.1. It is the State's position that Respondent did not overcome his burden on this issue.

*Rawlings v. Kentucky*, 448 U.S. at 104 (Defendant must show he had a legitimate expectation of privacy in Cox's purse); *Rakas v. Illinois*, 439 U.S. at 148 (Defendants must show that they had "a legitimate expectation of privacy in the particular areas of the automobile searched"). Whatever expectation of privacy Respondent may have had in the areas he used during his overnight stay, Respondent made no showing that he had any privacy interest in the small third floor storage closet in which he was found and arrested.

The practical effect of the Minnesota Supreme Court's decision, finding a legitimate expectation of privacy under these facts, is to weaken the "standing" requirement to the point where it virtually disappears. Consistent with the Minnesota court's holding, a defendant may assert that his personal Fourth Amendment rights were violated by an arrest in any private home to which he has fled to escape police if he can simply show that he has permission to be in the home and he and his "host" have not agreed on a departure time. This is simply a restatement of the "legitimately on the premises" standard which this court rejected in *Rakas v. Illinois*.[10]

Moreover, the court's holding complicates the job of police officers in the field. The decision creates the type of problem anticipated eight years ago by Justice Rehnquist:

> The genuinely unfortunate aspect of today's ruling is not that fewer fugitives will be brought to book, or fewer criminals apprehended, though both of these consequences will undoubtedly occur; the greater misfortune is the increased uncertainty imposed on police officers in the field, committing magistrates, and trial judges, who must confront variations and permutations of this factual situation on a day-to-day basis. They will, in their various capacities, have to weigh the time during which a suspect for whom there is an outstanding arrest warrant has been in the building, whether the dwelling is the suspect's home, how long he has lived there, whether he is likely to leave immediately, and a number of related and equally imponderable questions.

*Steagald v. United States*, 451 U.S. 204, 231 (1981) (Rehnquist, dissenting).

[10] Nevertheless, the Minnesota Supreme Court's position that a defendant's status as an overnight guest is alone sufficient to confer a reasonable expectation of privacy in his host's home is also held by at least two federal circuit courts across the country. *See* Argument II, *infra*.



Such a broad view of the scope of the Fourth Amendment will greatly increase the invocation of the exclusionary rule. There is a "substantial social cost" of the rule: not only is "relevant and reliable evidence . . . kept from the trier of fact," resulting in some guilty persons going free, *Rakas v. Illinois*, 439 U.S. at 137, but widespread use of the rule also causes public outrage and distrust of the criminal justice system. If the police violated anyone's rights by entering the Bergstrom home, they violated the Bergstroms'. Broadening Fourth Amendment protection to persons like Respondent who have such a tenuous connection to a place is not worth that social cost.

## II. IN HOLDING THAT RESPONDENT HAD "STANDING" TO CONTEST HIS WARRANTLESS ARREST, THE MINNESOTA SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT NEEDS TO BE, DECIDED BY THIS COURT TO RESOLVE CONFLICTS IN PRINCIPLE BETWEEN THE DECISION OF THE MINNESOTA SUPREME COURT AND DECISIONS OF OTHER STATE AND FEDERAL APPELLATE COURTS.

Since this court's decision in *Rakas v. Illinois*, numerous state and federal courts have addressed the scope of a defendant/guest's legitimate expectation of privacy in a third person's home. This is a critical and recurring issue in Fourth Amendment jurisprudence. Since the facts of each case are unique, however, no opinion appears to directly conflict with the Minnesota Supreme Court's decision. But conflicts in principle are numerous among the various state and federal courts considering the issue. Lower courts, while citing identical authority and language from this court, have reached inconsistent decisions which have left the law in this area in confusion. Review by this court is necessary to resolve these conflicts in principle and to clarify the law.

To determine whether guests in a third person's home possess a legitimate expectation of privacy in that home, lower courts have looked at several factors, including the guest's legitimate presence in the area searched; his possession or ownership of the area searched; his prior usage of the area; his ability to control the area by excluding others; and his subjective expectation of privacy. *See e.g. United States v. Carter*, 854 F.2d 1102 (8th Cir. 1988); *United States v. Rackley*, 742 F.2d 1266 (11th Cir. 1984); *United States v. Lochan*, 674 F.2d 960 (1st Cir. 1982); *United States v. Haydel*, 649



F.2d 1152 (5th Cir. 1981). Courts have considered such facts as whether the guest had a key, whether he had belongings at the place searched, or whether he was related to the owner of the premises. *United States v. Salvador*, 740 F.2d 752 (9th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985); *United States v. Perez*, 700 F.2d 1232 (8th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984); *United States v. Haydel*, 649 F.2d at 1155. In weighing these factors, however, courts have reached inconsistent and sometimes incongruous results.

Courts are split on the very question presented by this case, the extent of control necessary to create a legitimate privacy interest. Some courts hold that the defendant's status as an overnight guest is alone sufficient to show that he had a privacy interest in a third person's home. *See United States v. McIntosh*, 857 F.2d 466 (8th Cir. 1988); *United States v. Echegoyen*, 799 F.2d 1271 (9th Cir. 1986); *United States v. Underwood*, 717 F.2d 482 (9th Cir. 1983), *cert. denied*, 465 U.S. 1036 (1984). *See also State v. Elderts*, 62 Hawaii 495, 617 P.2d 89 (1980) (Since defendant was given permission by tenant to enter apartment, defendant had reasonable expectation of privacy there). Other courts hold that an overnight guest must also show a right to control access to the premises or possession of a key; the evidence required to show control, however, varies. *See United States v. Aguirre*, 839 F.2d 854 (1st Cir. 1988) (Defendant lacked privacy interest sufficient to object to search of apartment even though he had key because he offered no other evidence of right to control access or prior usage of apartment); *United States v. Gomez*, 770 F.2d 251 (1st Cir. 1985) (Defendant lacked "standing" to challenge search of apartment, even though he was the lessee, because he had been gone for four months, had allowed his brother to reside there in his absence, and made no showing

that he had the right to control premises); *United States v. Briones-Garza*, 680 F.2d 417 (5th Cir. 1982) (Even though defendant had lived at house for three weeks and could come and go at will, he lacked a sufficient privacy interest in house because he had no key, he could not control access to house and he shared house with fifty others); *United States v. Puliese*, 671 F.Supp. 1353 (S.D.Fla. 1987) (Defendant had no expectation of privacy where defendant was overnight guest who had no key and could not restrict access to home); *State v. Isom*, 196 Mont. 330, 641 P.2d 417 (1982) (Defendant's status as an overnight guest was not alone sufficient to confer "standing" to raise Fourth Amendment claim; defendant had "standing" because confiscated evidence was found near where defendant slept and defendant was alone in home and therefore had control over premises).

Courts also differ on the significance of *when* the defendant stayed overnight relative to the time of the search or seizure. *Compare United States v. Rackley*, 742 F.2d 1266 (11th Cir. 1984) (Defendant's expectation of privacy was limited, if it existed at all, because although defendant had key, could exclude others from home and had slept there on prior occasions, he had not stayed at house the night before the search) *with United States v. Small*, 664 F.Supp. 1357 (N.D.Cal. 1987) (Defendant had reasonable expectation of privacy in three separate residences simultaneously since he had been frequent guest at all of them).

Another question subject to inconsistent treatment is whether the privacy interest in the "area searched" includes the entire premises or is limited to the immediate area from which the seized property was taken. *Compare United States v. Nabors*, 761 F.2d 465 (8th Cir. 1985), *cert. denied*, 474 U.S. 851 (1985) *reh. denied*, 474 U.S. 1077 (1986) and *United States*



*v. Small*, 664 F.Supp. 1357 (N.D.Cal. 1987) (Court analyzed whether defendant had reasonable expectation of privacy in entire house, rather than in specific areas where contraband was found) *with United States v. Meyer*, 656 F.2d 979 (5th Cir. 1981), *cert. denied*, 464 U.S. 1001 (1983) (Court analyzed whether defendant had privacy interest in particular area searched, the bathroom cabinet). Courts also disagree on the assignment of the burden of proof on this question. *Compare United States v. Rackley*, 742 F.2d 1266 (11th Cir. 1984) (Defendant's expectation of privacy was limited to guest bedroom where he slept even though defendant had key to house because he did not show he had access to other portions of house that were searched) *with United States v. Perez*, 700 F.2d 1232 (8th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984) (Defendants as overnight guests had legitimate expectations of privacy in entire home because no evidence was produced that defendants were restricted from using any room in house).

The disparity in the way lower courts have applied this court's rulings on the scope of the Fourth Amendment's legitimate expectation of privacy has left the law in confusion. This court's review of the Minnesota Supreme Court's decision is necessary to clarify this important issue of federal constitutional law.

## III. IN HOLDING THAT EXIGENT CIRCUMSTANCES DID NOT JUSTIFY RESPONDENT'S WARRANTLESS ARREST BECAUSE POLICE COULD HAVE MAINTAINED A STAKEOUT OF THE PREMISES WHILE OBTAINING A WARRANT, THE MINNESOTA SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT NEEDS TO BE, DECIDED BY THIS COURT TO RESOLVE THE CONFLICT BETWEEN THE DECISION OF THE MINNESOTA SUPREME COURT AND THE DECISIONS OF OTHER STATE AND FEDERAL COURTS.

This case presents the question of whether, and under what circumstances, police are required to delay entry to arrest and instead stake out a residence while obtaining a warrant. This question, part of the broader issue of how to define the exigent circumstances necessary to justify a warrantless police entry of a dwelling to make an arrest, has not yet been decided by this court.

The Minnesota Supreme Court held that Respondent's warrantless arrest was not justified by exigent circumstances because: 1) Respondent was not the murderer but only his accomplice; 2) the police had already recovered the murder weapon; 3) Respondent had not yet left town; and 4) the police could have obtained a warrant, either during the hour while they waited for Respondent's return to the duplex or while they had the house surrounded. The Minnesota Supreme Court specifically held that exigent circumstances did not exist for Respondent's warrantless arrest because officers could have continued to stake out the house while trying to obtain a warrant (Appendix A at A-11-12). The Minnesota Court's decision needs to be reviewed by this court because: a)



the court's holding is wrong as a matter of public policy; b) the court's decision conflicts with several federal and state appellate court cases; c) appellate courts across the country are divided on the issue; and d) the court's decision is based on faulty reasoning.

*Decision is Contrary to Public Policy*

The court's holding that exigent circumstances did not exist for the warrantless arrest because officers could continue to stake out the house while trying to obtain a warrant is contrary to public safety and common sense. The court's assertion ignores the reality that to maintain surveillance of the "hideout" of a felon connected with an armed robbery and murder is extremely dangerous to the police, to the defendant, to the other occupants of the house, and to the public at large. Had the police maintained a stakeout at the duplex for the several hours required to obtain a murder complaint (or even a search warrant), Respondent, who knew he was involved in a robbery/murder, and that police were outside, may well have become desperate to escape. The stakeout would give him time to explore his options, including an armed shootout with the police or the taking of a hostage from within. A desperate Respondent may well have turned on his acquaintances, deciding perhaps that one of the Bergstroms must have reported his whereabouts to police. Meanwhile, the presence of numerous squad cars in a populated area not only disrupts local activities, but may well draw curious bystanders to the area where they could be harmed by the defendant's likely resistance to arrest. "The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others" *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967). The Minne-

sota Supreme Court's encouragement of stakeouts is not required by the Fourth Amendment and will have the effect of transforming the country's peaceful neighborhoods into armed camps whenever a felon chooses to hide out there.

Not only does the holding make the policeman's job more dangerous, but it also makes it more difficult:

> The policeman on his beat must now make subtle discriminations that perplex even judges in their chambers. As Mr. Justice Powell noted, concurring in *United States v. Watson, supra,* police will sometimes delay making an arrest, even after probable cause is established, in order to be sure that they have enough evidence to convict. Then, if they suddenly have to arrest, they run the risk that the subsequent exigency will not excuse their prior failure to obtain a warrant. This problem cannot effectively be cured by obtaining a warrant as soon as probable cause is established because of the chance that the warrant will go stale before the arrest is made.
>
> Further, police officers will often face the difficult task of deciding whether the circumstances are sufficiently exigent to justify their entry to arrest without a warrant. This is a decision that must be made quickly in the most trying of circumstances. If the officers mistakenly decide that the circumstances are exigent, the arrest will be invalid and any evidence seized incident to the arrest or in plain view will be excluded at trial. On the other hand, if the officers mistakenly determine that exigent circumstances are lacking, they may refrain from making the arrest, thus creating the possibility that a dangerous criminal will escape into the community. The police could reduce the likelihood of escape by staking out all possible exits until the circumstances become clearly exigent or a



> warrant is obtained. But the costs of such a stakeout seem excessive in an era of rising crime and scarce police resources.

*Payton v. New York,* 445 U.S. at 618-619 (White, dissenting).

*Decision Conflicts with other Courts*

Not surprisingly, several courts disagree with the Minnesota Supreme Court's encouragement of a stakeout under similar facts: *See United States v. Salvador,* 740 F.2d 752 (9th Cir. 1984), *cert. denied,* 469 U.S. 1196 (1985); *United States v. Webster,* 750 F.2d 307 (5th Cir. 1984); *United States v. Williams,* 612 F.2d 735, 739 (3rd Cir. 1979), *cert. denied,* 445 U.S. 934 (1980) ("[A]n immediate response by entry was necessary to prevent the occurrence of contingencies which would have made appellant's capture alive and without harm to the police or others impossible, or at least, unlikely; i.e., that appellant would barricade himself in the residence and engage in a shootout or attempt an armed escape with or without hostages".); *United States v. Campbell,* 581 F.2d 22 (2nd Cir. 1978); *United States v. Brightwell,* 563 F.2d 569 (3rd Cir. 1977), *cert. denied,* 439 U.S. 849 (1978); *United States v. McLaughlin,* 525 F.2d 517, 521 (9th Cir. 1975), *cert. denied,* 427 U.S. 904 (1976) ("The officers . . . could take their chances with respect to the destruction of the evidence, obtain reinforcements, and settle in for several hours of siege while awaiting the arrival of the warrant, or move quickly to arrest the occupants and to secure the premises and the evidence while awaiting the arrival of the warrant. We cannot accept the view that the Fourth Amendment requires that the officers pursue the former course. To do so would ignore the legitimate interests of the neighbors whose surroundings should not be impressed with a stage of siege, innocent per-

sons who might be injured accidently as a consequence of a large number of armed and mobile men, and the interest of the general public in efficient law enforcement and certain punishment for wrongdoers."); *United States v. Shye*, 492 F.2d 886, 892 (6th Cir. 1974) ("Although there was little likelihood of escape, due to the presence of so many officers, there was, nevertheless, a substantial likelihood of bloodshed or an impeding siege if quick action were not taken."); *State v. Girard*, 276 Or. 511, 515, 555 P.2d 445, 447 (1976) ("Defendant argued that the two officers could have 'surrounded' the house to avoid escape while they waited for reinforcements. That involves a large measure of speculation, depending upon a variety of factors relating to the feasibility of 'surrounding' the house or otherwise preventing escape, including the size of the house, the number of exits, the proximity of the house to cover for a person bent on escape, visibility, etc. In the exigencies of the moment, the officers could not reasonably be expected to put fine weights in the scale in weighing the chances of securing the house or of losing their quarry.").

*Country is Split on Issue*

Not all courts would disagree, however, with the Minnesota Supreme Court's holding; the country is divided on the issue. *Compare e.g. United States v. Patino*, 830 F.2d 1413 (7th Cir. 1987) (requiring a stakeout of armed robbery suspect's apartment pending procurement of a warrant ) *with United States v. Campbell*, 581 F.2d 22 (2nd Cir. 1978) (a stakeout of armed robbery suspect's apartment not required). *See also United States v. Alvarez*, 810 F.2d 879 (9th Cir. 1987); *United States v. Adams*, 621 F.2d 41 (1st Cir. 1980); *People v. Atkinson*, 116 Misc.2d 771, 456 N.Y.2d 328 (1982); and



*State v. Peller*, 287 Or. 255, 598 P.2d 684 (1979) (Courts decide warrantless entry was not justified by exigent circumstances under facts of case; courts suggest that police should have staked out the premises until a warrant could be obtained).

*Decision has Faulty Basis*

Because the Minnesota Supreme Court overlooked or misconceived several important facts, its decision was the result of faulty reasoning. The court failed to properly consider that the crime was a violent robbery and murder; that it was committed with a firearm; that police had reason to believe that Respondent might still possess a firearm; that Respondent had previously fled police; and that both the tip and Respondent's own statement over the telephone indicated that he intended to flee. The court also overlooked the fact that it takes much longer to obtain an arrest warrant (i.e., a murder complaint) than a search warrant. (*See* State's Petition for Rehearing, Appendix D at A-31-34).

The court also erred in concluding that the arrest of Respondent was "planned" and that any exigency was destroyed by the 45 minute delay between the establishment of probable cause and the arrest. Respondent's arrest was actually the culmination of an ongoing, continuous investigation into the identity and present location of Ecker's co-defendant. Moreover, the Minnesota Supreme Court ignored the fact that an exigency requiring police action may arise at any time after probable cause is established. *See Cardwell v. Lewis*, 417 U.S. 583, 595-96 (1974) ("Assuming that probable cause previously existed, we know of no case or principle that suggests that the right to search on probable cause and the reasonableness of seizing a car under exigent circumstances are foreclosed if a

warrant was not obtained at the first practicable moment . . . . The exigency may arise at any time, and the fact that the police might have obtained a warrant earlier does not negate the possibility of a current situation's necessitating prompt police action.") In this case, even if exigent circumstances did not exist before police surrounded the duplex, the necessity for quick police action arose after the telephone call into the duplex. When the police heard a male, presumably Respondent, instruct "Julie" to "tell them I left," police could reasonably have decided that Respondent intended to flee; under the facts of this case, police were then justified in entering immediately to prevent Respondent's escape.[11]

Because the Minnesota Supreme Court's decision is wrong as a matter of public policy; because the nation is divided on the question of exigent circumstances presented by this case; and because the Minnesota Supreme Court's holding conflicts, at least in principle, with decisions of numerous federal and state appellate courts; review of the Minnesota Supreme Court's decision by this court is necessary to clarify this important, but as yet unresolved, question of federal constitutional law.

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[11] The Minnesota Court's characterization of the arrest as "planned" and its failure to recognize that an exigency can arise at some point after probable cause is established, conflicts, at least in principle, with the opinions of several state and federal appellate courts. *See e.g. United States v. Cattouse*, 846 F.2d 144 (2nd Cir. 1988); *United States v. Santiago*, 828 F.2d 866 (1st Cir. 1987), *cert. denied*, —— U.S. ——, 108 S.Ct. 1244 (1988); *United States v. Standridge*, 810 F.2d 1034 (11th Cir. 1987), *cert. denied*, 481 U.S. 1072 (1987); *United States v. Picariello*, 568 F.2d 222 (1st Cir. 1978); *People v. Abney*, 81 Ill.2d 159, 407 N.E.2d 543 (1980).



## CONCLUSION

For the reasons discussed above, the State of Minnesota respectfully requests that the petition for a writ of certiorari to review the judgment of the Minnesota Supreme Court be granted.

Respectfully submitted,

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May 24, 1989

# APPENDIX

# APPENDIX

## APPENDIX A

STATE OF MINNESOTA
IN SUPREME COURT

C3-88-687

Hennepin County — Simonett, J.
Took no part, Keith, J.

STATE OF MINNESOTA,

Respondent,

vs.

ROBERT DARREN OLSON,

Appellant.

Filed February 24, 1989
Office of Appellate Courts

### SYLLABUS

Warrantless entry of defendant's dwelling, in absence of exigent circumstances, requires suppression of defendant's statement and, hence, a new trial.

Reversed and remanded for a new trial.

Heard, considered, and decided by the court en banc.

### OPINION

SIMONETT, Justice.

Defendant Robert Olson appeals his conviction for first degree murder, three counts of armed robbery, and three counts of second degree assault. He claims, among other

things, that his arrest was illegal, lacking probable cause and accomplished by a warrantless entry of the place where he was staying. We conclude Robert Olson's constitutional rights were violated by the warrantless entry requiring suppression of tainted evidence, and reverse for a new trial.

On Saturday morning, July 18, 1987, shortly before 6 a.m., a lone gunman robbed an Amoco station in Minneapolis, shooting to death the station manager. The police were quickly alerted and, from the description of the robbery, suspected Joseph Ecker. Two officers drove to Ecker's home, arriving at about the same time as a brown Oldsmobile pulled up. The Oldsmobile tried to escape, spun out of control, and came to a stop. Two white males got out of the car and fled on foot. In short order one of the two men, who proved to be Joseph Ecker and who was identified as the robber-gunman, was captured inside his home. The other man, unidentified but described as tall, thin, a white male in his early twenties with sandy brown hair, escaped. It was now about 6:15 a.m.

Inside the abandoned Oldsmobile police found a sack of money and the weapon soon thereafter identified as the murder weapon. Also in the car was a title certificate showing the Oldsmobile's owner to be Keith Jacobson. The name Rob Olson appeared on the certificate as a secured party but with the name crossed out; the bottom half of the certificate, used to transfer title, was missing. There was also a letter in the car, dated May 11, 1987, from an insurance company addressed to *Roger R.* Olson, 3151 Johnson Street. A second search of the car pursuant to a search warrant revealed a videotape rental receipt dated July 16, 1987 (2 days earlier), issued to Rob Olson. The police verified that a Robert Olson lived at 3151 Johnson Street. The police talked to Ecker and a woman who had been in the house when Ecker was arrested. Neither



identified Robert Olson as having been in the getaway Oldsmobile or connected with the robbery. The woman gave the names of persons who had been with Ecker the night before; Olson's name was not among them. The police were unable to locate Keith Jacobson.

The next day was Sunday, July 19. In the morning a woman called the police and said a man by the name of Rob was the driver of the getaway car and was planning to leave town by bus. The caller gave her name as Dianna Murphy. About noon the woman called again, said she was Dianna Murphy, and gave her address and phone number. She said that a woman named Maria lived on Garfield Northeast and gave Maria's phone number. Maria, she said, had told her that a man named Rob had admitted to Maria and to two other women, Louanne and Julie, that he was the driver in the Amoco robbery. The caller said Louanne was Julie's mother and the two women lived at 2406 Fillmore Northeast.

The detective-in-charge who took the second telephone call did not attempt to verify the identity of the caller. If he had, he would have learned no one by the name of Dianna Murphy lived at the address and phone number given. Neither was Maria contacted. The detective did, however, send police officers to 2406 Fillmore to check out Louanne and Julie. The Fillmore address proved to be a duplex. Louanne Bergstrom and her daughter Julie resided in the upper unit but were not home. Louanne's mother (Julie's grandmother) lived in the lower unit. She confirmed that a Rob Olson had been staying upstairs and promised to call the police when Olson returned. The grandmother was not aware of Olson's involvement in any robbery. A pickup order was then issued for Olson's arrest.

About 2:45 p.m., the grandmother called police and said Olson had returned. The detective then instructed police offi-

cers to surround the house. No effort was made to obtain an arrest warrant. The detective later explained in court that he had never attempted to get an arrest warrant on a weekend during his 20 years on the force. After the house was surrounded, the detective phoned Julie and told her Rob should come out of the house. The detective heard a male voice say "tell them I left." Julie then said that Rob had left, whereupon the detective ordered the police to enter the house. They did so with drawn weapons and without seeking permission. Defendant Olson, age 19, was found hiding in a closet.

After his arrest, defendant admitted to the police that he had driven Joseph Ecker from Ecker's house to an apartment building on Second Avenue Southeast near the Amoco station on University Avenue. Olson said Ecker had asked for a ride to pick up a girlfriend; that on the way he stopped at the Amoco station to buy cigarettes and pop; and that he then parked by the apartment building about a block from the station. He said Ecker was gone about 10 minutes and returned with a gun and a bag and ordered Olson to drive him home. Olson said he fled from the police at the Ecker house because he was scared of Ecker. Subsequent investigation disclosed that Olson had bought the Oldsmobile from Keith Jacobson but title had not yet been transferred. Defendant's defense at trial was that he had been duped into driving Ecker to the scene of the robbery.

The two main issues on appeal concern the legality of defendant's arrest. Was there probable cause? Did circumstances justify a warrantless, nonconsensual entry of the duplex? Defendant argues both these questions must be answered no, and, therefore, evidence obtained from his arrest—most importantly, his statement to the police—should have been suppressed.



I.

When police have arrested a suspect without a warrant, the test is whether the officers in the particular circumstances, conditioned by their own observations and information and guided by the whole of their police experience, reasonably could have believed that a crime had been committed by the person to be arrested. *State v. Merrill*, 274 N.W.2d 99, 108 (Minn. 1978). A determination of whether the police had probable cause to arrest is a determination of constitutional rights, and this court makes an independent review of the facts to determine the reasonableness of the police officer's actions. *See Ker v. California*, 374 U.S. 23, 34 (1963).

At the time of defendant's arrest the police knew that a robbery-homicide had occurred. They had arrested one suspect, Joseph Ecker, and had a description of the unknown driver. In the getaway car was a certificate of title listing Keith Jacobson as the car's owner. The name Rob Olson was on the title certificate but as a secured party and the name was crossed out. A receipt for a videotape rental, dated 2 days earlier, was also in the car, issued to Robert Olson.

The trial court found that this physical evidence alone, without the informant's tip, was sufficient to establish probable cause. We have our doubts. As defendant points out, this evidence only suggested Olson might have had some property or lien interest in the getaway car and that he may have ridden in the car 2 days before the robbery. Keith Jacobson would seem to have been a more likely suspect. Significantly, although the police had this physical evidence on Saturday, they did not issue a pick-up order for Olson until Sunday, after receiving the telephone tip from "Dianna Murphy."

Consequently, the question becomes whether the tip was reliable and if it together with the physical evidence establishes

probable cause. In evaluating an informant's tip, the court looks at the commonsense totality of the circumstances, including the informant's veracity, reliability, and basis of knowledge. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). In this case, the police knew nothing about the informant's identity or reliability. If the police had called the number "Dianna Murphy" gave them or checked her name in the telephone directory, they would have found there was no such person. The caller did not claim any personal knowledge of the information related, simply passing on what she had apparently been told by Maria, another unidentified source. On the other hand, the police did verify that at least part of the information given was correct, namely, that two women named Louanne and Julie lived at the address given and that a Rob Olson was staying there. The police also knew that the getaway car was connected in some way with a man named Rob Olson, which lent credence to the informant's statement that Rob Olson was the driver of the getaway car.

"[T]he fact that police can corroborate part of the informant's tip as truthful may suggest that the entire tip is reliable." *State v. Siegfried*, 274 N.W.2d 113, 115 (Minn. 1978). In *Siegfried*, however, the informant was known to the police as a reliable private citizen and had obtained the reported information by personal observation; further, the information had been accepted by a magistrate in granting an application for a search warrant. *See also State v. Wiley*, 366 N.W.2d 265 (Minn. 1985) (corroboration on a non-key item and informant had history of past reliability). The trial court here relied on *State v. Causey*, 257 N.W.2d 288 (Minn. 1977); but in *Causey* a magistrate had found probable cause for issuing a search warrant based on information supplied by a known reliable informant who accompanied the officer to the defendant's residence, where a car registered to a convicted drug possessor was parked. *Cf. State v. Elling*, 355 N.W.2d 286 (Minn. 1984) (police made extensive efforts verifying informant's identity and source of information). Nevertheless, there is force to the state's argument in this case that "Dianna Murphy's" tip was sufficiently corroborated so that, together with other known information, there was probable cause.



A review of our cases reveals, what should come as no surprise, that the "totality of the circumstances" test is fact-specific. In this case we conclude we need not resolve the probable cause issue because the issue of warrantless entry, which we next discuss, proves to be dispositive.

II.

Defendant claims the warrantless entry of the duplex at 2406 Fillmore to seize him was a violation of his fourth amendment rights. The state counters that defendant lacks standing to make this challenge; but, even if standing exists, exigent circumstances justified the warrantless entry of the duplex. We conclude defendant's constitutional rights were violated.

It is unclear why an arrest warrant was not obtained in this case, particularly since we have encouraged law enforcement officers to obtain a warrant whenever possible. *See Merrill*, 274 N.W.2d at 108. The previous day, Saturday, the police had no difficulty in obtaining a search warrant for the car in 2½ hours. Here, however, apparently no attempt was made to obtain an arrest warrant because it was Sunday, surely a curious reason for not observing the constitutional safeguards of citizens.

A

For defendant Olson to challenge the warrantless entry and seizure of his person at Louanne's house, he must show

a legitimate expectation of privacy in the upper duplex at 2406 Fillmore. *See State v. Brown*, 345 N.W.2d 233, 237 (Minn. 1984). For some days prior to the robbery, Olson had been living with Ecker at 2420 Polk. On Friday night he did not return to Ecker's house until 4:30 a.m., having been out on a date. On Saturday night Olson did not return to Ecker's house, nor to his own, because he was afraid of being arrested; instead he stayed that night at Louanne Bergstrom's duplex. The trial court found that Olson had no reasonable expectation of privacy in the 2406 Fillmore residence. The court said Olson was not a tenant; that he had no possessions at the duplex except for a change of clothes; and that he slept on the floor. This ruling ignores, however, the fact that Olson had permission to stay at 2406 Fillmore for some indefinite period, and that Louanne Bergstrom testified Olson had the right to allow or refuse visitors entry. While the United States Supreme Court has rejected the notion that anyone legitimately in a dwelling automatically has standing to challenge an illegal search, *Rakas v. Illinois*, 439 U.S. 128, 142 (1978), this does not mean that a guest never has standing. *See also United States v. Salvucci*, 488 U.S. 83 (1980) (overruling the holding in *Jones v. United States*, 362 U.S. 257 (1960) that possession of a seized good creates standing). Indeed, this case is quite similar to *Jones*, where an expectation of privacy was found. Jones had permission to stay at a friend's apartment; he had a key; he had a change of clothes; his home was elsewhere; and he had slept at the friend's apartment for "maybe a night." *Id.* at 259. Although the *Rakas* court subsequently qualified the rationale of *Jones*, it expressly reaffirmed the factual holding of that case. *Rakas*, 439 U.S. at 142-43. *See also Steagald v. United States*, 451 U.S. 204, 230-31 (1981) (Rehnquist, J., dissenting).



The trial court thought it significant that Olson was trying to evade the police so that his presence at 2406 Fillmore was "wrongful." Not so. A reasonable expectation of privacy is not forfeited (nor to be emasculated) because of the defendant's motives for seeking privacy. As LaFave explains, "to deny standing merely because it turns out the defendant had a criminal purpose is in sharp conflict with the rationale underlying the exclusionary rule." 4 W. LaFave, *Search and Seizure* § 11.3(b) at 299 (2d ed. 1987).

Finally, the state argues that defendant had no *actual* expectation of privacy. In *Smith v. Maryland*, 442 U.S. 735, 740 (1979), the United States Supreme Court said that to challenge an illegal search a defendant must have an actual expectation of privacy as well as one that society is prepared to recognize as reasonable. The trial court thought that defendant's statement to Julie, "tell them I've left," indicated that defendant had no actual expectation of privacy at 2406 Fillmore. We think not. This statement more likely suggests that defendant was simply attempting to discourage the police from invading his privacy by giving them a further reason, albeit of doubtful plausibility, not to enter the house.

We hold that defendant has standing to challenge the legality of his arrest.

B.

The right to be secure in the place which is one's home, to be protected from warrantless, nonconsensual intrusion into the privacy of one's dwelling, is an important fourth amendment right. *See, e.g., Welsh v. Wisconsin*, 466 U.S. 740, 749 (1984); *State v. Storvick*, 428 N.W.2d 55, 61 (Minn. 1988). To justify a warrantless arrest in a defendant's home, the state must show urgent need, *i.e.*, the presence of exigent circumstances. We make our own evaluation of the found facts

(which in this case are not in dispute) in concluding whether exigent circumstances exist. *Storvick*, 428 N.W.2d at 58 n. 1. In making this determination, we have used the so-called *Dorman* analysis, with the understanding that the *Dorman* factors are part of a flexible approach that encompasses all relevant circumstances. *State v. Lohnes*, 344 N.W.2d 605, 611 (Minn. 1984).[1] Thus, a warrantless intrusion may be justified by hot pursuit of a fleeing felon, or imminent destruction of evidence, *Welsh*, 466 U.S. 740, or the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling. *Lohnes*, 344 N.W.2d 605; *State v. Hatcher*, 322 N.W.2d 210 (Minn. 1982).

In this case the state claims exigent circumstances for a warrantless arrest in Louanne's duplex because defendant was a suspect in a murder, guns had been found in the getaway car, defendant had fled the police once, and there was information that he might try to flee again.

While it is true a grave crime was involved, it is also true that the suspect was known not to be the murderer but thought to be the driver of the getaway car. Probable cause to believe the suspect was the driver depended, as we have seen, in large part on the reliability of the unknown informant. The police had already recovered the murder weapon. The suspect had not left town by bus, at least not yet, as the telephone tip had indicated, but had returned to the duplex where he had

[1] The *Dorman* analysis considers: (a) whether the offense is a grave offense, particularly a crime of violence; (b) whether the suspect is reasonably believed to be armed; (c) whether the showing of probable cause connecting the defendant to the offense is more than minimal; (d) whether the police have strong reason to believe that the suspect is in the premise being entered; and (e) whether there is a likelihood that the suspect will escape if not swiftly apprehended. *Dorman v. United States*, 435 F.2d 385, 392-93 (D.C. Cir. 1970).



stayed the previous night. The police knew that Louanne and Julie were with the suspect in the upstairs duplex with no suggestion of danger to them. Three or four Minneapolis police squads surrounded the house. The time was 3 p.m., Sunday.

We do not think the particular circumstances of this case amount to exigent circumstances. It was evident the suspect was going nowhere. If he came out of the house he would have been promptly apprehended. This case is unlike *Lohnes*, for example, where the suspect was believed to have committed the crime of violence, probable cause was strong, and the weapon had not been found. In *Lohnes*, too, the dwelling was in an isolated rural area, distant from a magistrate, the time 5 a.m., and it was doubtful if sufficient police resources were on hand to contain the suspect until an arrest warrant could be obtained. *Lohnes*, 344 N.W.2d at 611-12.

Cases from other jurisdictions are split on whether surveillance or a stake-out should be used to gain time to obtain an arrest warrant. *See* 2 W. LaFave, *Search and Seizure* § 6.1(f), at 605-08 (2d ed. 1987). Again, the differing circumstances can explain the differing results. Sometimes a stake-out will adequately freeze the situation, while on other occasions the ensuing delay may increase the chances of escape or danger to others. LaFave suggests a distinction between an arrest which is planned in advance and an arrest in medias res, which occurs in the field as part of unfolding developments. *Id.* Thus, in *Lohnes*, we pointed out that the arrest was the culmination of a rapidly developing situation in the field, with only 35 minutes elapsing from the time the sheriff attempted to locate the suspect to the warrantless arrest of the suspect at his home. *Lohnes*, 344 N.W.2d at 611. *See also Welsh*, 466 U.S. at 761 (White, J., dissenting) ("The decision to arrest without a warrant typically is made in the field

under less-than-optimal circumstances * * *."). Where, however, the arrest is planned in advance, it is less likely the police can claim exigent circumstances.

Shortly after 1 p.m. on Sunday the detective in charge talked with Julie's grandmother on the telephone and learned that a Rob Olson "had been staying upstairs for a day or two with Louanne and Julie," and he obtained the grandmother's promise to call if Rob returned to the house. At 2 p.m. the detective issued a pick-up order for Olson, what he called a "probable cause arrest bulletin." The police were instructed to stay away from the duplex. At 2:45 p.m. the grandmother called the detective again to report Rob had returned. Squad cars were sent to the duplex and, at 3 p.m., the detective (coordinating the arrest efforts from headquarters by radio and telephone) ordered entry of the duplex. Olson was brought to headquarters within an hour. By then the detective who had been in charge was gone. He went off duty at 3 p.m. At least by 2 p.m., then, the police had made plans for Olson's arrest at the dwelling where he was staying at such time as Olson might return. Nevertheless, in the hour that elapsed before any arrest could be made at the duplex, no effort was made to obtain an arrest warrant to enter the dwelling. We do not know if a warrant could have been obtained within that hour, or within a relatively short time thereafter; on the other hand, the state has not suggested the warrant could not have been obtained. We do know a search warrant was obtained on Saturday, the day before, in 2 1/2 hours when the urgency to search an already impounded car was much less.

A warrantless, nonconsensual intrusion of one's dwelling is not to be lightly regarded; indeed, such an entry is considered presumptively unreasonable, and the United States Supreme Court has stressed the state bears a "heavy burden"



to establish exigent circumstances. *Welsh*, 466 U.S. at 749. In this particular case, considering all the circumstances, we do not think that burden has been met. We hold defendant's fourth amendment rights were violated.

C.

Defendant asks that all evidence obtained from the illegal arrest be suppressed. This includes Olson's statement, the statements of all persons present at 2406 Fillmore at the time of his arrest, and Joseph Ecker's statement which was obtained after the police showed him Olson's statement. Evidence obtained as a result of an illegal arrest must be suppressed unless it is obtained by means sufficiently distinguishable from the illegal exploitation to be purged of the primary taint. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). Here Olson was taken immediately to police headquarters, and the police obtained a statement from him within an hour of his illegal arrest. We believe the statement was tainted and must be suppressed.

While the state has not argued that Olson's statement was untainted, it does argue that admission of Olson's statement at trial was harmless beyond a reasonable doubt. *See State v. Forcier*, 420 N.W.2d 884, 886-87 (Minn. 1988). There was other evidence, says the state, to establish that Olson was the driver of the getaway car, and Olson's statement had no significant impact on the guilty verdicts. At trial, however, the state relied heavily on various details in Olson's statement to point out discrepancies in his story; these discrepancies were then used to argue that Olson was lying about being duped by Ecker. For example, in his statement Olson said he was in the Amoco station about 10 minutes before the robbery to buy cigarettes and pop but the surveillance videotape showed no customer in the store at that time. In final argument, the

prosecutor told the jury, "Now the proof of the pudding here, ladies and gentlemen, is in this statement"; and the prosecutor then went on, point by point, to show where Olson's statement did not appear to square with other facts. Olson's credibility was a key issue at trial and use of his statement obtained as a result of the illegal arrest was not harmless error.

We reverse and remand for a new trial. As we have mentioned, defendant claims there is other evidence which should also be suppressed along with his statement. He supports his claim only by assertion, and the record before us is unenlightening. The trial court on remand will be in a better position to deal with these claims. We need not reach other issues raised by defendant in this appeal.

Reversed and remanded for a new trial.

KEITH, Justice, took no part in the consideration or decision of this case.



## APPENDIX B

STATE OF MINNESOTA
IN SUPREME COURT

C3-88-687

STATE OF MINNESOTA,

Respondent,

vs.

ROBERT DARREN OLSON,

Appellant.

ORDER

This court, having considered en banc the petition for rehearing in the above entitled cause,

IT IS ORDERED that the petition for rehearing be and hereby is denied and stay vacated.

Dated: March 28, 1989

By the Court:
JOHN E. SIMONETT
Associate Justice

KEITH, Justice, took no part in the consideration or decision of this case.

## APPENDIX C

State of Minnesota — District Court
County of Hennepin — Fourth Judicial District

File No. 94726-2

STATE OF MINNESOTA,

Plaintiff,

v.

ROBERT D. OLSON,

Defendant.

### ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

The above-entitled matter came duly on for *Rasmussen* hearing before the undersigned Judge of District Court on December 15th and 16th, 1987.

Mr. Gary S. McGlennen, Assistant Hennepin County Attorney, appeared on behalf of the state.

Mr. Glenn P. Bruder, Esq., appeared on behalf of the defendant, who was also present.

The Court, having considered all files, records and proceedings herein, together with the memorandae and arguments of counsel, now makes the following:

### FINDINGS OF FACT

1. That on July 18, 1987 a lone gunman entered the Amoco Station at 1000 University Avenue in Minneapolis.

2. That the gunman committed an armed robbery during the course of which the station manager, Roger Reinhart, was fatally shot.

3. That the gunman then fled the service station.



4. That Minneapolis Police Officers Scott Grabowski and Duane Pihl heard a police dispatcher report the robbery, shooting and suspect's appearance.

5. That Officer Pihl believed, because of a police report he had received, that this suspect might be one Joseph Ecker, who resided at 2420 Polk Avenue Northeast.

6. That the officers proceeded to that location where they observed a brown Oldsmobile proceeding northbound in the alley between 24th Street and Lowry Avenue.

7. That the officers exited their squad car and drew their weapons and began approaching the vehicle.

8. That the vehicle began backing rapidly away from the officers northbound down the alley towards Lowry Avenue.

9. That the officers re-entered their squad car and began to pursue the vehicle.

10. That the driver of the vehicle lost control of the vehicle as he turned onto Lowry Avenue and the car stopped.

11. That two individuals exited the vehicle and fled the area on foot.

12. That other Minneapolis Police Officers arrived on the scene and the house at 2420 Polk was searched; Joseph Ecker was taken into custody and subsequently identified as the gunman who had entered the Amoco Station.

13. That a search of the vehicle turned up a certificate of Title on which Robert Olson's name appears, a letter address to Roger Olson, and a video movie rental receipt made out to Robert Olson and dated July 16, 1987.

14. That on Sunday, July 18, 1987, Sergeant James DeConcini was on duty in the Homicide Division of the Minneapolis Police Department.

15. That Sergeant DeConcini knew that there had been a robbery-homicide at the Southeast Amoco the day before;

knew that the brown Oldsmobile had been linked to this robbery-homicide; knew that one occupant of the Oldsmobile, a caucasian male, was still at large; and knew that physical evidence found in the Oldsmobile linked the vehicle to one Robert Olson.

16. That on Sunday morning, Sergeant DeConcini learned from Sergeant Robert Nelson that a "Diana Murphey" had called and stated that a "Rob" was the driver of the car involved in the robbery-homicide and that "Rob" was planning to leave town by bus soon.

17. That later that same day, a caller identifying herself once again as "Diana Murphy" telephoned Sergeant DeConcini and stated that "Rob" had told three people that he was the driver of the brown Oldsmobile used in the robbery-homicide and that two of the people he had told this to were "Julie" and "LouAnne" of 2406 Fillmore Northeast.

18. That Sergeant DeConcini sent Minneapolis Police Officers to 2406 Fillmore Northeast to verify this information.

19. That when the officers arrived at 2406 Fillmore they learned that the dwelling was a duplex and that Julie and LouAnne Bergstrom resided in the upper apartment.

20. That the officers talked to the resident of the lower apartment, Helen Niederhoffer, who told them that Rob Olson was staying upstairs but was not there at that time; Ms. Niederhoffer stated she would call the police when Robert Olson returned.

21. That Sergeant DeConcini issued a pick-up order for Robert Olson at approximately 2:00 p.m.

22. That at approximately 2:30 p.m. Helen Niederhoffer called Sergeant DeConcini and stated that Robert Olson had returned to the upstairs apartment at 2406 Fillmore.



23. That Sergeant DeConcini then dispatched officers to 2406 Fillmore.

24. That when the officers had taken up positions outside the residence, Sergeant DeConcini telephoned the residence and spoke with Julie Bergstrom; Sergeant DeConcini told Julie Bergstrom that he wanted Robert Olson to go outside and Sergeant DeConcini heard a male voice say, "Tell them I left."; Julie Bergstrom then stated, "Rob left already."

25. That Sergeant DeConcini related this information to the officers stationed outside the residence.

26. That the officers then entered the residence at 2406 Fillmore and arrested Robert Olson.

27. That at the Rasmussen hearing Dianna Joe Humphrey testified that she resided at the address given by the caller to Sergeant DeConcini and that her phone number matched the number given by the caller to the sergeant, but that she never made any calls to anyone regarding Robert Olson.

28. That Robert Olson testified that he had stayed at 2406 Fillmore for one night, had no bed there and had slept on the floor, had no closet, dresser, toothbrush, and only one bag of clothes, and was reluctant to return to 2420 Polk, where he had been living previously, because he knew that the police had arrested Joseph Ecker there and had searched that premises.

## CONCLUSIONS OF LAW

1. The warrantless arrest of the defendant at 2406 Fillmore Northeast was not violative of his Fourth Amendment rights.

2. Defendant had no reasonable expectation of privacy in the residence at 2406 Fillmore Northeast.

3. Probable cause existed to arrest the defendant without a warrant at 2406 Fillmore Northeast.

4. There being no violation of the defendant's Fourth Amendment rights, there are no grounds for excluding and suppressing any evidence derived, directly or indirectly, from the defendant's arrest at 2406 Fillmore.

ORDER

1. Defendant's motion to exclude and suppress any and all evidence, directly or indirectly derived from his arrest at 2406 Fillmore is hereby denied in all respects.

2. The attached memorandum is hereby incorporated by reference.

Dated: January 29, 1988.

By The Court:
JAMES H. JOHNSTON
Judge of District Court

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MEMORANDUM

THE WARRANTLESS ARREST OF THE DEFENDANT WAS NOT VIOLATIVE OF HIS FOURTH AMENDMENT RIGHTS. ANY AND ALL EVIDENCE DERIVED DIRECTLY OR INDIRECTLY FROM THIS ARREST WILL THEREFORE NOT BE EXCLUDED OR SUPPRESSED.

I. Defendant had no reasonable expectation of privacy in the dwelling located at 2406 Fillmore Northeast.

In order to successfully move to suppress evidence, the defendant must have had a reasonable expectation of privacy in the area searched. See, *State v. Brown*, 345 N.W.2d 233, 237 (Minn. 1984). If the defendant had no such expectation of privacy, then he lacks the requisite standing to challenge the constitutionality of the police conduct. If the defendant did in fact have a reasonable expectation of privacy, the Court will then inquire whether the defendant exhibited an actual expectation of privacy (see *United States v. Chadwick*, 433 U.S.



1 (1977) and whether his expectation is one that society recognizes as reasonable, (see *Smith v. Maryland*, 442 U.S. 735 (1979)).

In the present case, the Court finds that the defendant had no legitimate expectation of privacy in the dwelling at 2406 Fillmore and therefore lacks standing to challenge the evidence derived from his arrest at that location. Furthermore, the Court finds that, even if defendant did have a legitimate expectation of privacy at 2406 Fillmore for purposes of standing, the defendant did not exhibit any actual expectation of privacy in that dwelling and also that any expectation of privacy the defendant had was unreasonable.

The Court finds that the defendant had no legitimate expectation of privacy for the following reasons. Defendant's abode for a number of weeks before July 19, 1987 was 2420 Polk, not 2406 Fillmore. Defendant was reluctant to return to 2420 Polk because he knew that Joseph Ecker had been arrested there in connection with the robbery-homicide at the Southeast Amoco and also that the police had searched the dwelling on Polk. The defendant had been linked to this robbery-homicide by evidence found in the vehicle used to flee the scene and by tips from an informant. Defendant was not the owner of the property at 2406 Fillmore. He was not a tenant at the house. Defendant had spent only one night there when he was arrested. He had no dresser or closet and only one bag of clothes with him. He had no bed but instead slept on the floor. He did not have a toothbrush at 2406 Fillmore. Based on these facts, the Court finds that the defendant had no legitimate expectation of privacy in the dwelling at 2406 Fillmore and therefore lacks standing to challenge any and all evidence against him procured as a result of his arrest at that location.

Furthermore, the Court finds defendant's statement to Julie Bergstrom (telling her to tell the police that he had left the premises) shows that defendant did not exhibit any expectation of privacy in the dwelling at 2406 Fillmore. The Court also finds that since the defendant had been connected with a robbery-homicide and was reluctant to return to his usual abode on Polk, the defendant was not an invited guest at 2406 Fillmore but rather a fugitive from a criminal investigation. The Court therefore finds that any expectation of privacy the defendant may have had was unreasonable.

In conclusion, the Court finds that the defendant had no legitimate expectation of privacy in the premises at 2406 Fillmore. Defendant therefore lacks standing to challenge the evidence procured against him as a result of his arrest at that location. Defendant did not exhibit any actual expectation of privacy in that dwelling and any expectation of privacy the defendant may have had, for purposes of argument, was unreasonable.

II. The police had probable cause to arrest the defendant at 2406 Fillmore without an arrest warrant.

Probable cause is defined as:

> A reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty.

*State v. Olson*, 342 N.W.2d 638, 640 (Minn.Ct.App.); *State v. Childs*, 269 N.W.2d 25, 27 (Minn. 1978). Where the police have arrested a suspect without a warrant the test is whether the officer in the particular circumstances, conditioned by his own observations and information, and guided by the whole of his police experience, reasonably could have believed that a crime had been committed by the person to be arrested. *State v. Merrill*, 274 N.W.2d 99 (Minn. 1980). Although the Fourth



Amendment prohibits the police from making a warrantless entry into the suspect's home to make an arrest, absent consent or hot pursuit, the defendant in this case was not in his own home and, as has already been discussed, had no legitimate expectation of privacy in the dwelling where he was arrested. The issue is whether Sergeant DeConcini had probable cause to order the arrest of the defendant at 2406 Fillmore on July 19, 1987. For the following reasons, the Court finds that probable cause did exist to arrest the defendant.

At the time of the defendant's arrest, Sergeant DeConcini knew that a robbery-homicide had occurred at the Southeast Amoco. He also knew that two pieces of physical evidence, a certificate of title and a movie rental receipt, had been found in the vehicle that had been linked to the robbery-homicide and that these pieces of evidence implicated the defendant. Sergeant DeConcini was also aware of two telephone calls from a "Diana Murphey" who stated that "Rob" had told "Julie" and "LouAnne" that he had driven this vehicle and that he was planning to leave town soon by bus. This "Diana Murphey" had also stated that "Julie" and "LouAnne" resided at 2406 Fillmore Northeast. Sergeant DeConcini sent Minneapolis police officers to verify the tip. The officers went to 2406 Fillmore Northeast and did verify that the upper portion of the duplex was occupied by Julie and LouAnne Bergstrom and that Robert Olson was in fact staying there.

At the Rasmussen hearing the defendant, through counsel, contended that because there is no such person as "Diana Murphey" the statements from this person can not form the basis for probable cause to arrest the defendant. (There is a Dianna Joe Humphrey living at the address given by the informant, but Ms. Humphrey denied making any calls to Sergeant DeConcini or anyone in the Minneapolis Police Department.) The Court can not agree with this argument.

As a dispositive matter, the Court finds that Sergeant DeConcini had probable cause to order the defendant's arrest even without the information provided by "Diana Murphey". Sergeant DeConcini knew that a robbery-homicide had occurred at the Southeast Amoco Station one day earlier and that one suspect had been captured after a short car chase and that another male caucasian suspect was still at large. The sergeant knew that the vehicle which had been the subject of the brief chase, and which the two suspects had occupied, had been searched and that evidence had been discovered inside it linking the vehicle to the robbery-homicide and a Robert Olson to the vehicle. The Court finds that under these circumstances, Sergeant DeConcini, conditioned by his own observations and information, and guided by his police experience, could reasonably have believed that the defendant had been involved in the robbery-homicide at the Southeast Amoco Station of July 18, 1987, even without considering the information provided by "Diana Murphey".

The Court also finds that the information provided by "Diana Murphey" could properly be considered by Sergeant DeConcini for purposes of establishing probable cause even though the true identity of "Diana Murphey" was and remains unknown. The credibility of an (anonymous) informant's information may be established by sufficient corroboration of the details of the tip so that it is clear that the informant is telling the truth on this occasion. *State v. Causey*, 257 N.W.2d 288 (Minn. 1977). The Court finds that the police did sufficiently corroborate the information they received from "Diana Murphey".

The information that "Diana Murphey" gave to the police was that "Rob" was the driver of the getaway car and that he was planning to leave town soon on a bus. "Diana Murphey"



also told Sergeant DeConcini that "Rob" had admitted his involvement in the robbery-homicide to three people, two of whom were "Julie" and "LouAnne", who lived at 2406 Fillmore. The police went to 2406 Fillmore and verified that Julie and LouAnne Bergstrom did in fact live at that address. The police also confirmed that a Robert Olson was staying with Julie and LouAnne in their upper duplex apartment. Later that day before entering the residence to arrest the defendant, Sergeant DeConcini confirmed that there was a "Rob" in the premises at that time and that "Rob" wanted the police to believe that he had left the dwelling. Although the police did not confirm every aspect of "Diana Murphey's" tip, they did verify that two women named Julie and LouAnne lived at the address stated by "Diana Murphey", that a Robert Olson was staying with ther , and that a "Rob" was in the dwelling when Sergeant DeConcini called the residence and that "Rob" did not want the police to know that he was still there when the sergeant telephoned.

The Court concludes, based on the foregoing facts, that it was reasonable for Sergeant DeConcini to believe the credibility of an anonymous informant under these circumstances. Given the aspects of the tip that were corroborated and verified by the police, it was reasonable for Sergeant DeConcini to believe that the remainder of the information in the tip was reliable as well. The Court finds that the details of "Diana Murphey's" information were sufficiently corroborated so that it was clear to Sergeant DeConcini that this anonymous informant was telling the truth.

In conclusion, the Court finds that there was probable cause to arrest the defendant without a warrant. There was sufficient evidence discovered in the suspected getaway vehicle to establish probable cause against the defendant. The informa-

tion supplied by "Diana Murphey" was furthermore sufficiently corroborated by the police to justify Sergeant DeConcini's belief that the tip was true.

CONCLUSION

The Court has found that the defendant had no legitimate expectation of privacy in the dwelling at 2406 Fillmore. Therefore the defendant lacks the requisite standing to challenge the legality of the evidence procured from his arrest on Fourth Amendment grounds. The Court has also found that probable cause existed under the facts and circumstances of this case to justify the warrantless arrest of the defendant. Defendant's motion to exclude and suppress the evidence obtained as a direct or indirect result of his arrest on July 19, 1987 must there be and is hereby denied.

J.H.J.



## APPENDIX D

C3-88-687

STATE OF MINNESOTA
IN SUPREME COURT

STATE OF MINNESOTA,
Petitioner-Respondent,
vs.
ROBERT DARREN OLSON,
Respondent-Appellant.

STATE'S PETITION FOR REHEARING

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## STATEMENT OF THE CASE

On February 11, 1988 Appellant was convicted of first degree felony murder, armed robbery and second degree assault in connection with the armed robbery of a gas station and murder of the station's manager. Appellant filed a Notice of Appeal on March 29, 1988. The parties submitted their briefs to this court in July and October, 1988. The court heard oral argument on January 11, 1989. On February 24, 1989 this court issued its opinion reversing Appellant's convictions and remanding the case for a new trial. *See State v. Olson*, —— N.W.2d —— (Minn. filed February 24, 1989, attached to this petition at Appendix pp. 1-12). From this decision the State of Minnesota petitions the court for rehearing pursuant to Minn.R.Civ.App.P. 140.01.



## ARGUMENT

**I. IN HOLDING THAT APPELLANT HAS STANDING TO CHALLENGE THE LEGALITY OF HIS ARREST, THIS COURT MISCONCEIVED A MATERIAL FACT AND MISAPPLIED EXISTING CASELAW; THE EFFECT OF THAT DECISION IS TO VIRTUALLY ELIMINATE THE STANDING REQUIREMENT IN MINNESOTA.**

This court decided that, even though Olson did not own or rent the duplex, had merely slept on the floor there one night, and had no possessions there except for a change of clothes, Olson nevertheless had a reasonable expectation of privacy at 2406 Fillmore because (1) he had permission to stay there for an indefinite period and (2) he had the right to allow or refuse visitors entry (slip opinion, p.7). The court relied on *Jones v. United States*, 362 U.S. 257 (1960) to support its holding, stating that "this case is quite similar to *Jones*" (slip opinion, p.7). Because the court misconceived the record concerning Olson's right to exclude others from the duplex, its reliance on *Jones* was misplaced. Unless the decision is reconsidered and reversed, its effect is to virtually eliminate the standing requirement in Minnesota.

In *Jones v. United States*, 362 U.S. 257 (1960) the Supreme Court held that anyone legitimately on the premises where a search occurs has standing to challenge the legality of the search. The court significantly narrowed the *Jones* holding, however, in *Rakas v. Illinois*, 439 U.S. 128 (1978):

> We think that *Jones* on its facts merely stands for the unremarkable proposition that a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place.

439 U.S. at 142. The court nevertheless affirmed the *Jones* result, holding that Jones had a legitimate expectation of privacy in the apartment searched. Crucial to that decision was the fact that Jones had a key to the apartment. He could therefore come and go at will, and freely admit and exclude others: "Jones had complete dominion and control over the apartment and could exclude others from it." *Rakas v. Illinois*, 439 U.S. at 149.

This court's reliance on *Jones* was erroneous since the record does not support the court's assertion that Olson had the right to allow or refuse visitors entry to the dwelling. The only discussion of this issue in the record is the following brief exchange between Louanne Bergstrom and the defense attorney during the Rasmussen hearing:

> Q. And if somebody came over to see Mr. Olson, did he have your permission to admit them or refuse to admit them?
>
> A. I don't know. It was never discussed.
>
> Q. Had somebody come over to visit Mr. Olson, would you have allowed him to decide if that person would visit with him?
>
> A. If I saw no reason not to.

(R.192). Thus, there was no evidence at all that Olson had the right to refuse others entry; with respect to admitting entry to others, Bergstrom clearly retained the final authority. Nor did Olson have a key to the duplex, a fact which is extremely important. When a host gives his guest a key to his house, he is in effect saying, "my home is your home," and in fact the guest then does have complete control over the premises, as in *Jones*. Olson, however, did not have a key, could not enter without the presence of another occupant of the home, had no right to refuse entry to others, and had only that limited



authority to admit his friends as Louanne Bergstrom allowed him. Olson's interest in the duplex is far less than the kind of complete dominion and control required by the United States Supreme Court.

The practical effect of the decision is to weaken the standing requirement to the point where it virtually disappears. A defendant now may assert that his personal Fourth Amendment rights were violated by an arrest in any private home to which he has run to escape police if he can merely show that he has permission to be in the home and he and his "host" have not agreed on a departure time. This is merely a restatement of the "legitimately on the premises" standard which the Supreme Court rejected in *Rakas v. Illinois*.

Moreover, such a broad view of standing will greatly increase the invocation of the exclusionary rule. There is a "substantial social cost" of the rule: not only is "relevant and reliable evidence . . . kept from the trier of fact," resulting in some guilty persons going free, *Rakas v. Illinois*, 439 U.S. at 137, but widespread use of the rule also causes public outrage and distrust of the criminal justice system. If the police violated anyone's rights by entering the Bergstrom home, it was the Bergstroms'. Broadening Fourth Amendment protection to persons like Olson who have such a tenuous connection to a place is not worth that social cost.

## II. THE COURT'S HOLDING THAT THE ARREST WAS NOT JUSTIFIED BY EXIGENT CIRCUMSTANCES SUGGESTS THAT THE COURT OVERLOOKED MATERIAL FACTS; THE OPINION'S ENCOURAGEMENT OF POLICE "STAKE-OUTS" GREATLY INCREASES THE DANGEROUSNESS OF MINNESOTA NEIGHBORHOODS.

As this court noted in its opinion, whether exigent circumstances exist to justify a warrantless arrest is to be determined by a consideration of all relevant circumstances. *State v. Lohnes*, 344 N.W.2d 605, 611 (Minn. 1984). In its analysis, however, the court misconceived or overlooked several important facts, which, when taken into consideration, compel the opposite result. Furthermore, by encouraging police to "stake-out" a home while trying to obtain a warrant, the court's opinion, if not reexamined and reversed, will greatly increase the dangerousness of Minnesota neighborhoods.

In holding that no exigent circumstances existed to justify the warrantless entry in this case, the court overlooked or misconceived the following facts:

1) The court gave too little weight to the seriousness of the offense. The offense involved in this case was murder, the gravest possible offense. In *Welsh v. Wisconsin*, 466 U.S. 740 (1984) the United States Supreme Court held that the gravity of the underlying offense is an extremely important factor to be considered in deciding whether exigent circumstances exist.

2) In assessing Olson's dangerousness, the court gave too much weight to the fact that Olson was not the one who pulled the trigger. The police suspected Ecker of committing a series of armed robberies. They had probable cause to believe that Olson aided Ecker in the commission of this robbery/murder. Their experience in the field led them to believe that Olson probably also participated in the planning of the offense. To the extent that the co-defendant approves of, and assists in, the commission of a serious, violent offense, a policeman in the field is justified in believing the co-defendant to be just as dangerous as the one who pulled the trigger.

3) The court misconceived the importance of the recovery of the murder weapon. Although the weapon used by co-



defendant Ecker was recovered, the police were justified in assuming that Olson too might be armed, for the following reasons: a) Found in Olson's car were two empty shoulder holsters for handguns, as well as a pellet gun and a knife; b) Olson had ample opportunity after his escape from police to obtain a firearm; and c) the offense which Olson helped commit was armed robbery and murder.

4) The court gave too little weight to the following facts, which, to a police officer in the field, may mean imminent flight of a suspect: a) Olson had successfully fled police once; b) police had received information that he might flee again; c) Olson's statement to Julie Bergstrom, "tell them I left," could be reasonably construed by officers as a statement of Olson's present intent to flee at that moment; and d) the seriousness of the offense and the fact that the co-defendant had been arrested makes flight more likely. *See Welsh v. Wisconsin*, 466 U.S. at 759 (White, J., dissenting) ("The seriousness of the offense with which a suspect may be charged also bears on the likelihood that he will flee and escape apprehension if not arrested immediately.").

5) The court overlooked the difference between the time it takes to obtain an arrest warrant, i.e. a complaint, and a search warrant. Much more time is required to obtain a murder complaint than a search warrant since, not only is a judge required, but a county attorney must also be located; must review all the police reports, decide to issue the complaint; and have the documents typed and filed. When the complaint is sought during the weekend the time required is greater still.

6) The court erroneously concluded that the arrest was "planned in advance" (slip opinion, p.10). The arrest was the culmination of an ongoing, continuous investigation into the

identity and present location of Ecker's co-defendant. As far as the police knew, Olson might return to the duplex at any moment. *See United States v. Williams*, 612 F.2d 735, 739 (3rd Cir. 1979), *cert. denied* 445 U.S. 934 (1980) (Exigent circumstances existed for warrantless arrest in private home, "[F]or, while *subsequent* events indicated that the police officers had sufficient time and opportunity to obtain a search warrant; i.e., the appellant remained on the premises under surveillance for several hours before the arrest was made, when the officers first undertook the surveillance there is no evidence to suggest that they had any reason to believe they would have more than minutes to wait for the appellant's exit."). Moreover, police could not have obtained a murder complaint in the 45-60 minutes that elapsed before Olson returned.

The Court suggested that exigent circumstances did not exist for the warrantless arrest because officers could continue to "stake-out" the house while trying to obtain a warrant (slip opinion, pp.9-10). This assertion ignores the reality that to maintain a stake-out of a felon connected with an armed robbery and murder is extremely dangerous—to the police, to the defendant, to the other occupants of the house, and to the public at large. Had the police maintained a stake-out at the duplex for the several hours required to obtain a murder complaint (or even a search warrant), Olson, who knew he was involved in a robbery/murder, may well have become desperate to escape. The stake-out would give him time to explore his options, including an armed shoot-out with police or the taking of a hostage from within. Olson, desperate, may well turn on his friends, deciding that one of the Bergstroms must have reported his whereabouts to police. Meanwhile, the presence of numerous squad cars in a popu-



lated area not only disrupts local activities, but may well draw curious bystanders to the area where they could be harmed by the defendant's likely resistance to arrest. *See* 2 W.LaFave, *Search and Seizure* §6.1(f) at 605-06 (2d ed. 1987); *United States v. Standridge*, 810 F.2d 1034, 1037 (11th Cir. 1987) ("It was safer to arrest Standridge immediately by surprise in his motel room, than to wait for a warrant, and to risk a gun battle erupting in the halls, stairs, lobby or other public area of the fully occupied hotel should Standridge try to escape."); *United States v. Campbell*, 581 F.2d 22, 26 (2nd Cir. 1978) ("Moreover, had the officers decided to set up surveillance of the apartments while waiting for a warrant to be issued, they would have risked the possibility of detection by appellants. If appellants had been alerted to the presence of the police, they might well have had sufficient time to dispose of the stolen money and other evidence in their possession. Furthermore, the risk of an armed confrontation would have been heightened.").

"The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others." *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967). The court's encouragement of stake-outs is not required by the Fourth Amendment and will have the effect of transforming our peaceful neighborhoods into armed camps whenever a felon chooses to hide out there. This court must reverse its ruling in the interests of public safety.

## CONCLUSION

For the reasons stated herein the State respectfully requests pursuant to Minn.R.Civ.App.P. 140.01 that this court reconsider its decision and affirm Appellant's convictions.

DATED: March 3, 1989

Respectfully submitted,

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# OPPOSITION

# BRIEF

No. 88-1916

IN THE
# Supreme Court of the United States

October Term, 1988

STATE OF MINNESOTA,

*Petitioner,*

v.

ROBERT DARREN OLSON,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

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## QUESTIONS PRESENTED

1. Relying on information provided by a fictitious informant, Minneapolis police officers directed Respondent's arrest in a dwelling where he temporarily resided. Prior to ordering Respondent's arrest, police officers took no steps to confirm the identity of the fictitious tipster or to investigate her credibility. Similarly, police officers did not attempt to obtain an arrest warrant before directing the storming of the home in which Respondent temporarily resided. Prior to his arrest, Respondent was given permission to stay indefinitely at this dwelling by its residents, had no immediate intention of leaving the premises, received guests at the home and, if he chose, had the right to exclude persons from the dwelling. Under these circumstances, did Respondent have a reasonable expectation of privacy in his temporary residence sufficient to enable him to challenge his warrantless arrest under the Fourth and Fourteenth Amendments to the United States Constitution?

2. On Sunday, July 19, 1987 Minneapolis police received information from a fictitious informant implicating Respondent in a robbery and murder which occurred the previous day. Minneapolis police officers took no steps to identify the informant, nor did they attempt to contact the persons claimed by the fictitious informant to have specific knowledge of Respondent's claimed involvement in the offense. Those individuals later testified at a pre-trial hearing that they had no information regarding the July 18, 1987 offense nor were they even acquainted with Respondent. Although, on Saturday, July 18, 1987, other police officers needed only two and one-half hours to obtain a search warrant for Respondent's ve-

hicle, Minneapolis police officers made no effort to secure an arrest warrant on July 19, 1987. The investigating officer testified at a pre-trial hearing that he did not do so because he did not wish to disturb local prosecutors during their leisure time. Although the July 18, 1987 offense did involve a violent crime, the murder weapon was recovered at the scene, police officers had no reason to believe that Respondent was armed or that his presence was endangering the residents of the home where he temporarily resided. The police were aware that Respondent was staying at this dwelling with the explicit consent of the building's tenants. There was no danger that delay in arresting Respondent would lead to the destruction of evidence; although a delay would have permitted the police to investigate the credibility of the fictitious tipster's information. Under these circumstances, do any exigent circumstances exist justifying the subsequent warrantless storming of Respondent's residence by police officers bearing shotguns and drawn revolvers?



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IN THE

# Supreme Court of the United States

October Term, 1988

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No. 88-1916

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STATE OF MINNESOTA,

*Petitioner,*

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ROBERT DARREN OLSON,

*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES SUPREME COURT

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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

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## OPINION BELOW

The Minnesota Supreme Court issued its Opinion reversing Respondent's conviction on February 24, 1989. This Opinion is reported at 436 N.W.2d 92 (Minn. 1989). It is also appended to this brief as Appendix A.

## JURISDICTION

The judgment of the Minnesota Supreme Court was entered on February 24, 1989. The State subsequently filed a Petition for Rehearing on March 6, 1989. The Respondent served his Reply to that Petition for Rehearing on March 10, 1989; this document is reproduced and attached to this Brief as Appendix B. On March 29, 1989 the Minnesota Supreme Court denied the State's Petition for Rehearing. The State then filed its Petition for a Writ of Certiorari on May 26, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).



## STATEMENT OF THE CASE

On July 18, 1987 a lone gunman entered a service station in Minneapolis, Minnesota (RHT. 48-60).[1] During the course of an armed robbery, this person shot station manager Roger Reinhardt (T. 30). Mr. Reinhardt later died as a result of this gunshot wound (T. 217).

Immediately after the gunman fled the scene, the robbery and shooting were reported to law enforcement officials. Minneapolis police dispatchers summoned police units to the service station and broadcast information describing the robbery, shooting, and suspect's physical appearance (RHT. 48, 60). Two Minneapolis police officers, Officers Grabowski and Pihl, heard this report (RHT. 48, 60, T. 149). Officer Pihl believed the single suspect's general physical description and behavior matched that of Joseph Ecker, a suspect in other recent armed robberies (RHT. 60-61, T. 150). The officers traveled to Mr. Ecker's home at 2420 Polk Avenue N.E. (RHT. 60, T. 150).[2]

As the officers waited in an alleyway alongside the home, a brown Oldsmobile approached their squad car (RHT. 10, 64, T. 153). Officer Pihl immediately exited the squad car, drew his service revolver, and pointed it at the driver of the brown automobile (RHT. 11, 65, T. 154, 174).[3] Officer Grabowski

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[1] "RHT" refers to the transcript of the pre-trial suppression hearing conducted pursuant to Minnesota Rule of Criminal Procedure 11.02. This procedure is generally mandated by *State ex rel. Rasmussen v. Tahash*, 272 Minn. 539, 141 N.W.2d 3 (1965). Consequently, this hearing is labeled a "Rasmussen" hearing and transcript references will be abbreviated "RHT" in this brief. "T" refers to the trial transcript.

[2] When officer Pihl came on duty at approximately 11:00 P.M. on July 17, 1987, he was presented with a "flyer" describing the previous robberies which identified Mr. Ecker as the sole suspect in those offenses (RHT. 62). This document listed Mr. Ecker's address as 2420 Polk Avenue N.E., Minneapolis, MN.

[3] Both Officers Grabowski and Pihl testified that they only observed one individual inside the vehicle at this time (RHT. 10).

reached into the rear of the police vehicle and began to remove a pump action shotgun (RHT. 11, T. 174). The brown automobile began backing away from the police car, turned in a "T portion" of the alleyway and proceeded "rapidly" northbound down the alleyway in apparent flight (RHT. 11, 66, 78, T. 154). Officers Pihl and Grabowski re-entered their patrol vehicle and began pursuing the brown Oldsmobile (RHT. 11, 65, 66). The driver lost control of the automobile as he attempted to exit the alleyway (RHT. 12, 16, 68, T. 155). As Officers Pihl and Grabowski approached the area, two individuals exited the Oldsmobile and fled on foot (RHT. 14, 69, T. 155). Officers Pihl and Grabowski attempted to chase these persons on foot, but quickly lost sight of each (RHT. 16-17, 69-71, T. 159). Within a few moments, other Minneapolis police officers arrived at the scene. These officers entered the house at 2420 Polk Avenue N.E. and emerged, in a few minutes, with Joseph Ecker in custody (RHT. 17-18, 72, T. 165). Mr. Ecker was later positively identified as the gunman who robbed the service station (T. 61, 86). Respondent's picture did not appear in the photographic lineup used to obtain Ecker's identification (T. 96).

Minneapolis police detective Robert R. Nelson arrived at 2420 Polk Avenue at approximately 6:15 A.M. (RHT. 98). Detective Nelson conducted a brief examination of the Oldsmobile and removed a Certificate of Title from the automobile. This Certificate identified the automobile's owner as Keith Jacobson (RHT. 99, T. 263-264). Detective Nelson also removed a letter from the vehicle. That letter was addressed to "Roger R. Olson" (RHT. 106, T. 225). It concerned an insurance claim from May, 1987 (T. 225). Detective Nelson then returned to 2420 Polk Avenue N.E. where he had separate conversations with Mr. Ecker and Dawn Corr, who was present in the house at the time Mr. Ecker was arrested (RHT.



102, 109). Neither individual identified Respondent as the driver or the passenger in the automobile which fled from Officers Pihl and Grabowski (RHT. 102, 109). Detective Nelson then attempted to locate the automobile's registered owner, Keith Jacobson, without success (RHT. 104, T. 226). Detective Nelson did not issue arrest orders for either Mr. Olson or Mr. Jacobson (RHT. 104, 131).

Detective Nelson later returned to his office and related his investigation and observations to Minneapolis police detective Michael Sauro. Detective Sauro promptly secured a search warrant for the Oldsmobile and the home at 2420 Polk Avenue N.E. (RHT. 87). Although this was a Saturday morning, Detective Sauro was able to obtain the search warrant within two and one-half hours (RHT. 87-88). Detective Sauro subsequently seized a variety of materials from the home and automobile. The only item found in the automobile which bore any connection with Respondent was a videotape rental slip dated July 16, 1987 (RHT. 85, 93, T. 367, 369).[4] When Detective Sauro executed the search warrant at 2420 Polk Avenue, he too found Dawn Corr present (RHT. 88). He interviewed Ms. Corr who stated that a number of people were with Mr. Ecker the previous evening (RHT. 89). Respondent was not included in that list (RHT. 89).

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[4] In its Petition, the prosecution asserts that a variety of documents were found in the vehicle linking Respondent . . . to the car." The prosecution's Petition also notes that "a pellet gun . . . a knife, a knife sheath and two empty shoulder holsters for handguns . . ." were also found in the vehicle. In reality, although the prosecution introduced a bounty of goods seized from the vehicle, the items bore no indication of ownership. Detective Sauro admitted that the shoulder holsters did not bear Mr. Olson's name or initials (T. 372) and that at least one of the holsters found in the trunk bore salt stains suggesting that it had been there for some time—long before Respondent's purchase of the vehicle (T. 371).

The following day, July 19, 1987, a woman identifying herself as "Diana Murphy" telephoned Minneapolis police detective James DeConcini and, for the first time, made direct accusations against Respondent. This informant apparently told officers that "a guy named Rob" was staying with "LouAnn" and "Julie" at 2406 Fillmore N.E. and had told someone named "Maria" that he was one of the men who had fled from police the preceding day (RHT. 113-114). Detective DeConcini was not familiar with the informant and took no steps to confirm her identity (RHT. 121, 123). Detective DeConcini conceded that he had 1986-1987 telephone directories available to him on July 19, 1987 but simply did not bother employing them to confirm the informant's identity (RHT. 123). Detective DeConcini admitted that if he had made this minimum effort he would have discovered that the name provided to him by this informant was, in fact, fictitious (RHT. 124). Detective DeConcini never spoke with "Maria," Julie or LouAnn Bergstrom to confirm the information provided by "Diana Murphy" (RHT. 122-125). He did, however, request Minneapolis police officers to travel to 2406 Fillmore Avenue N.E. to "locate Julie or LouAnn at that address and have one or both of those parties call me to verify the information given to me by Ms. Murphy" (RHT. 114).[5]

When officers first visited the home at 2406 Fillmore N.E., they discovered it was a duplex and that LouAnn and Julie Bergstrom resided in the upper unit. Neither Julie Bergstrom

[5] Interestingly, another witness, Officer VonLehe, contradicted Detective DeConcini's version of these events and stated that when Minneapolis police officers initially went to 2406 Fillmore on July 19, 1987, it was, at Detective DeConcini's instruction, for the express purpose of arresting Mr. Olson, not to get corroborating information (RHT. 142).



nor her mother, LouAnn, were home and officers spoke with the downstairs resident, Helen Niederhoffer (RHT. 114). Ms. Niederhoffer stated that a "party known to her as Rob Olson had been staying upstairs . . ." (RHT. 114). She agreed to telephone police when Mr. Olson returned (RHT. 115). Ms. Niederhoffer added that she was not privy to any conversation with Respondent regarding his alleged involvement in the July 18, 1987 robbery (RHT. 125). Ms. Niederhoffer telephoned Detective DeConcini at approximately 2:30 P.M. on July 19, 1987 and advised him that Mr. Olson had returned to the home at 2406 Fillmore (RHT. 137). Detective DeConcini then instructed Minneapolis police officers to surround the home and arrest Mr. Olson (RHT. 136-137). Detective DeConcini made no effort to obtain an arrest warrant prior to issuing this instruction (RHT. 127). Even though Detective Sauro had been able to procure a search warrant within two and one-half hours on the preceding day, Detective DeConcini stated that it never occurred to him to obtain an arrest warrant and that he had never attempted to secure an arrest warrant on a weekend during his twenty years as a Minneapolis police officer (RHT. 129-130). Detective DeConcini added that he was also reluctant to disturb local prosecutors on Saturday or Sunday and disrupt their leisure time (RHT. 116).

Acting at Detective DeConcini's direction, Minneapolis police officers entered the Bergstrom home and arrested Mr. Olson (RHT. 139).[6] When entering the home these officers did so with drawn revolvers and shotguns (RHT. 185-186, T. 542, 414). They did not seek consent of any occupant or resident before storming the building (RHT. 54, 145, 155,

[6] Respondent was arrested in an upstairs closet (T. 414). He did not threaten officers or resist arrest (T. 414).

198, 219, T. 413). Following Respondent's arrest, Minneapolis police officers transported Mr. Olson, LouAnn Bergstrom, Julie Bergstrom, and others seized at the premises to the Minneapolis Police Department Homicide office (RHT. 154, 165-166). While in custody, Respondent provided a statement to Sgt. Steven Sawyer, in which he admitted driving the brown Oldsmobile on July 18, 1987, but denied any involvement in the offense. Respondent stated that he was unaware of Mr. Ecker's intentions and was an innocent dupe (T. 389-396).

On August 11, 1987 the Hennepin County Minnesota Grand Jury indicted both Respondent and Joseph Ecker on charges of first degree felony murder contrary to Minnesota Statutes §609.185(3), aggravated robbery in violation of Minnesota Statutes §609.245, and second degree assault under Minnesota Statutes §609.222. At a pre-trial hearing Respondent timely moved to suppress his post-arrest statement on the grounds that his warrantless arrest violated the Fourth and Fourteenth Amendments of the United States Constitution. Respondent contended that the arrest was made without probable cause and that, even if police officers did possess probable cause, that Respondent had a legitimate expectation of privacy in his temporary residence. Consequently, Respondent contended that his warrantless arrest directly contravened the principles set forth by this Court in *Payton v. New York*, 445 U.S. 573 (1980). The State replied that it could rely on its fictitious informant to create probable cause and that Respondent lacked "standing" to raise the constitutional issues related to the invasion of the home at 2406 Fillmore. The State also asserted that even if Respondent could raise this claim, exigent circumstances justified the warrantless arrest.



The testimony produced at the pre-trial hearing unequivocally demonstrated that Respondent was an authorized guest at this home, intended to stay there indefinitely, and had the tenant's permission to do so. In addition, Mr. Olson kept a change of clothes at the premises and had the right to allow or refuse visitors' entry (RHT. 184, 192, 198, 217, 220). In particular, Mr. Olson testified:

> Q. Did you intend to continue staying at that address?
>
> A. Yes.
>
> Q. Did you have any other place to stay?
>
> A. No, I did not.
>
> Q. Were you ever asked to leave by the Bergstrom's?
>
> A. No, I was not . . .
>
> Q. . . . When you talked to your friends, if you told them to meet you someplace, where would you tell them to meet you?
>
> A. I told them to meet me at that address.
>
> Q. If you told them to call you on the telephone, what number would you give them?
>
> A. Julie's number (RHT. 217-218).

The Trial Court rejected each of Respondent's claims. It rebuffed Respondent's probable cause attacks by concluding "the information provided by Diana Murphy could properly be considered by Sgt. DeConcini for purposes of establishing probable cause even though the true identity of Diana Murphy was, and remains, unknown." The Court refused to consider Respondent's other challenge by concluding that he had no reasonable expectation of privacy in the dwelling located at 2406 Fillmore Avenue N.E. Interestingly, the Court based this determination, at least in part, on its conclusion that the Respondent was "a fugitive from a criminal investigation . . .

therefore . . . any expectation of privacy the Defendant may have had was unreasonable." [7]

On February 11, 1988 Respondent was convicted of one count of first degree felony murder, three counts of armed robbery, and three counts of aggravated assault. The jury acquitted Respondent of one count of first degree felony murder.[8] On March 29, 1988 Respondent appealed his conviction to the Minnesota Supreme Court. Respondent's Appeal alleged numerous errors warranting reversal of his conviction. The Minnesota Supreme Court addressed only one of those issues. It concluded that Respondent did possess a legitimate expectation of privacy in the dwelling at 2406 Filimore and that his warrantless arrest directly contravened the Fourth and Fourteenth Amendments to the United States Constitution. Accordingly, the Minnesota Supreme Court reversed Respondent's conviction and remanded this case for a new trial.

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[7] The Trial Court's conclusion that Respondent had no expectation of privacy because he was a subject of a criminal investigation is absolutely unsupportable. At the time Respondent began his stay at the Bergstrom home, he was not sought by police. Mr. Olson's arrest was not directed until *after* he began staying at the Bergstrom home. Moreover, even if literally true, the fact that an individual is the subject of a criminal investigation does not strip him or her of an expectation of privacy in certain places. In every instance where a Court has concluded that a warrantless arrest was unjustified, the individual arrested was the subject of a criminal investigation. If the person asserting a Fourth Amendment right was not the subject of a criminal investigation, he or she simply would not have been arrested. Holding that anyone who is the subject of a criminal investigation is bereft of any expectation of privacy in his or her dwelling will, by definition, emasculate the Fourth Amendment.

[8] The jury convicted Respondent of violating Minnesota Statutes §609.185(3) but acquitted him of a companion charge alleging a violation of Minnesota Statutes §609.185(1).



## ARGUMENT

**I. The Minnesota Supreme Court properly followed applicable decisions of this Court by concluding that Respondent had a reasonable expectation of privacy in his temporary dwelling sufficient to permit invocation of Fourth and Fourteenth Amendment safeguards.**

The prosecution argues that Respondent "lacked a reasonable expectation of privacy in the duplex" where he was arrested (Petition, p. 11) and that the Minnesota Supreme Court's decision weakens the "standing requirement to the point where it virtually disappears" (Petition, p. 12). Certainly, Fourth Amendment rights are personal and may not be vicariously asserted. *Brown v. United States*, 411 U.S. 223, 230 (1973). For that reason, Respondent's ability to raise these constitutional claims require a right personal to him be transgressed. Traditionally Courts have viewed this concept as "standing" to challenge a search or seizure. Given the continuing evolution of constitutional law, the catch phrase "standing" is no longer entirely accurate. Beginning in *Katz v. United States*, this Court focused its analysis of the Fourth Amendment's scope on an individual's privacy expectations. Commenting that "the Fourth Amendment protects people, not places," this Court held that whenever a person possesses a reasonable expectation of privacy in a particular context, he can avail himself of the protection granted by the Fourth Amendment. 398 U.S. 347, 351 (1967).

The Petitioner initially contends that the Minnesota Supreme Court's decision is thematically inconsistent with *Rakas v. Illinois*, 439 U.S. 128 (1978).[9] (Petition, p. 12). The Minne-

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[9] *Rakas v. Illinois* narrowed an earlier decision, *Jones v. United States*, 362 U.S. 257 (1960). In the *Jones* decision, this Court concluded "anyone legitimately on the premises where a search occurs may challenge its legality." Id. at 267.

sota Supreme Court undoubtedly examined and considered *Rakas* before publishing its opinion. Indeed, the February 24, 1989 decision repeatedly cited *Rakas v. Illinois* in support of Respondent's claims. The Minnesota Supreme Court construed *Rakas* as rejecting "the notion that anyone legitimately in a dwelling automatically has standing to challenge an illegal search . . ." but added ". . . this does not mean that a guest never has standing . . ." and "although the *Rakas* Court subsequently qualified the rationale of *Jones*, it expressly reaffirmed the factual holding of that case . . ." (A-8).

That construction of *Rakas* can hardly be considered inaccurate. In that decision, Chief Justice Rehnquist commented:

> We think that *Jones*, on its facts, merely stands for their unremarkable proposition that *a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable government intrusion into that place* (citations omitted). In defining the scope of that interest, we adhere to the view expressed in *Jones* and echoed in later cases that arcane distinctions developed in property and tort law between guests, licensees, invitees and the like ought not to control. (Emphasis supplied.)

439 U.S. at 142-143. Yet, the State's Petition expressly invites this Court to now reinvigorate those technical criteria as a focal point for Constitutional analysis. The prosecution argues that the mere fact that Respondent did not possess a key to the dwelling "is extremely important to consider . . ." (Petition, p. 11). Simply because Respondent did not possess a key, the State contends that there are "important factual differences between this case and *Jones* which the Minnesota Supreme Court overlooked . . ." (Petition, p. 10). Suggesting that a guest in a dwelling possesses a reasonable expectation



of privacy only if he has a key and "control of the premises" once again supplants privacy expectations with mechanistic concepts. The Petitioner asks this Court to strip away Respondent's subjective privacy expectation merely because he did not have a key to the premises.[10]

To permit an accused to challenge the validity of an arrest only if he or she possessed a key to the dwelling where the seizure occurred runs contrary to the analytical constructs of both *Rakas* and *Jones*. In particular, Chief Justice Rehnquist noted:

> . . . Capacity to claim the protection of the Fourth Amendment depends not on a property right in the invaded place, but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place (citations omitted). Viewed in this matter, the holding in *Jones* can best be explained by the fact that Jones had a legitimate expectation of privacy in the premises he was using and therefore can claim the protection of the Fourth Amendment with respect to a government invasion of those premises even though his interests in those premises might not have been a recognized property interest at common law.

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[10] Respondent's warrantless arrest is presumptively unlawful and the prosecution bears the burden of establishing the validity of that arrest. *Welsh v. Wisconsin*, 466 U.S. 740 (1984). The State's Petition for a Writ of Certiorari blithely asserts that Respondent did *not* have a key to the premises. There is no support for that assertion in the *Rasmussen* hearing transcript. The Prosecutor failed to inquire, of any witness, including Respondent, if he received a key to the premises from LouAnn or Julie Bergstrom. Under the circumstances, if the State considered Respondent's receipt of a key to be crucial to the issue of "standing," it should have made this inquiry at that time.

*Rakas v. Illinois*, 439 U.S. at 143. Similarly, in *Jones v. United States*, this Court declared:

> We are persuaded that it is unnecessary and ill advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures, subtle distinctions developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical . . . Distinctions such as those between 'lessee,' 'licensee,' 'invitee,' and 'guest' often only of gossamer strength, ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards.

362 U.S. 257, 265-266 (1960). Yet that is precisely what the State suggests this Court do by inviting it to find possession of a key as "crucial" to privacy expectations. (See Petition, p. 10.)[11]

Plainly, the Minnesota Supreme Court analyzed the testimony of all witnesses and properly concluded that Mr. Olson had a reasonable expectation of privacy in the premises at 2406 Fillmore. Its opinion noted that Mr. Olson kept a change of clothes at the premises, that he had permission to stay for

[11] Contrary to the State's assertion, possession of a key was apparently only one factor considered by this Court in *Jones*. See *Jones v. United States*, 362 U.S. at 259; *Rakas v. Illinois*, 439 U.S. at 141. This is hardly surprising. The author of this brief employs a cleaning person who possesses keys to my dwelling. This individual is present for but a few hours each month. She receives no guests, telephone calls or messages at this address. She does not sleep there nor consume meals on the premises. Incredibly, under the State's analytical framework, this cleaning person would have a greater expectation of privacy than Respondent simply because she has a key to the property.



an indefinite period, and that he had the right to allow or refuse visitors' entry (A-8).[12] These conclusions are amply documented in the pre-trial hearing transcript (RHT. 184, 192, 198, 217, 220).

Petitioner contends that the Minnesota Supreme Court's use of the exclusionary rule will provoke "public outrage and distrust of the criminal justice system," and "broadening the Fourth Amendment protection to persons like Respondent . . . is not worth that social cost" (Petition, p. 13). This argument is patently offensive. In their haste to arrest Mr. Olson without a warrant, Minneapolis police officers failed to follow even the simplest investigatory procedures, recklessly and negligently relied on false information from a fictitious informant, and directed the storming of a dwelling by armed officers bearing shotguns and revolvers. Now the prosecution suggests that prohibiting use of evidence derived from such conduct is likely to spur "public outrage," "distrust of the criminal justice system," and that protecting Respondent's rights is "not worth that social cost." [13] In *Mapp v. Ohio*, 367

[12] The State's Petition reluctantly admits "this case and *Jones* seem factually similar" (Petition, p. 10). Indeed, they are remarkably similar. In *Jones*, the accused had permission to stay at a friend's house, brought a change of clothes with him, and slept at his friend's apartment for "maybe a night." 362 U.S. at 259. The *only* apparent factual distinction between *Jones* and the present case is possession of a key.

[13] At the pre-trial suppression hearing, LouAnn Bergstrom testified that she opened the door of her home to police officers armed with drawn revolvers and shotguns and that she felt powerless to refuse them entry (RHT. 184-185).

Julie Bergstrom testified that she believed herself seized by police officers and described her treatment as follows: "They were holding me in a room upstairs when they were searching for Rob and a lady officer dragged me down the stairs against my will and another lady outside was searching under my skirt, lifting my skirt all the way up. My mom asked if she could drive us

U.S. 643, 659 (1961), this Court eloquently rebutted the underpinnings of this philosophy:

> . . . There is another consideration—the imperative of judicial integrity. The criminal goes free if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws or worse, its disregard of the charter of its own existence.[14]

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down to the police station and they refused. They said no, that we had to ride in the squad car. I figured that if we were being taken against our will, then they must have to read me my rights." (RHT. 198).

Not surprisingly, Miss Bergstrom testified that she believed herself mistreated and was frightened. However, she was mistreated and frightened by police officers—not Respondent (RHT. 200). Respondent respectfully suggests that inhibiting conduct of this nature by police officers is worth the "social cost" of the exclusionary rule. Apparently the Minnesota Supreme Court agrees.

[14] The Prosecution believes that the Minnesota Supreme Court's decision did not safeguard judicial integrity, but merely "weakened the standing" requirement to the point where it virtually disappeared. The prosecution contends that the Minnesota Supreme Court's decision is "simply the restatement of the 'legitimately on the premises' standard which this Court rejected in *Rakas v. Illinois*" (Petition, p. 12). Even a cursory reading of the Minnesota Supreme Court opinion belies this analysis. In its decision, the Minnesota Supreme Court explicitly noted "the United States Supreme Court has rejected the notion that anyone legitimately in a dwelling automatically has standing to challenge an illegal search . . ." (A-8). The Minnesota Supreme Court added "This does not mean that a guest never has standing . . ." (A-8) and ultimately concluded that Respondent had a reasonable expectation of privacy because (1) he had permission to stay at 2406 Fillmore for an indefinite period, (2) he had the right to allow or refuse visitors' entry, (3) that he had a change of clothes at the premises, (4) and that he had an actual expectation of privacy (A-8-9). The State's suggestion that the Minnesota Supreme Court held that Olson's position . . . as an overnight guest is alone sufficent to confer reasonable expectation of privacy in his host's home" is, consequently, not consistent with the express language of the opinion.



## II. There is no conflict in principal between the decision of the Minnesota Supreme Court determining that Respondent had a reasonable expectation of privacy in the scene of his arrest and decisions of other State and Federal Appellate Courts.

The State of Minnesota contends that the issues raised in this case are "critical and recurring . . . in Fourth Amendment jurisprudence" (Petition, p. 14). Its Petition argues that "conflicts in principal are numerous among the various State and Federal Courts considering the issue" (p. 14). To buttress this claim, the State's Petition cites a variety of apparently inconsistent judicial decisions.

Although superficially compelling, the State's laundry list of lower Court decisions does not accurately portray the present status of judicial decision-making on this issue. As the State reluctantly admits, "the facts in each case are unique . . ." and ". . . no opinion appears to directly conflict with the Minnesota Supreme Court's decision" (Petition, p. 14). Obviously, suppression decisions are fact specific. Because a Court in one jurisdiction suppresses evidence while another refuses to do so does not mean that the state of jurisprudence is a mine field of confusion. It merely means that lower Courts are compelled to make their suppression decisions on an individual basis.

This does not mean that lower Courts are applying vastly-differing tests or standards to make that determination. Indeed, there is no doubt that lower Courts have readily adopted the general standard that an individual can raise a Fourth Amendment seizure challenge only when he or she has a legitimate expectation of privacy in a given area. See *United States v. Aguirre*, 839 F.2d 854 (1st Cir. 1988); *United States v.*

*Echegoyen*, 799 F.2d 1271 (9th Cir. 1986); *United States v. Pollock*, 726 F.2d 1456 (9th Cir. 1984); *State v. Reddick*, 207 Conn. 323, 541 A.2d 1209 (1988); *People v. Smith*, 420 Mich. 1, 360 N.W.2d 841 (1984).

In applying this general principal, lower Courts use remarkably similar criteria. Trial Courts consider a guest's legitimate presence at the scene, the extent of the accused's actual use or occupancy of the premises, right to exclude others, the defendant's subjective expectation of privacy in the area, the nature and degree of the accused's freedom to utilize the property, and his relationship with the actual owner or tenant. See *United States v. McIntosh*, 854 F.2d 466 (8th Cir. 1988); *United States v. Sangineto-Miranda*, 859 F.2d 1501 (6th Cir. 1988); *United States v. Gerena*, 662 F.Supp. 1265 (D. Conn. 1987).[15]

Lower Courts recognize "whether a reasonable expectation of privacy exists is a determination to be made on a case-by-case basis." *State v. Reddick*, 541 A.2d at 1213. See also *United States v. Brock*, 667 F.2d 1311, 1320, n. 8 (9th Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983); *United States v. Brown*, 635 F.2d 1207, 1211 (6th Cir. 1980). Consequently, the weight given these factors varies under the unique circumstances of each case. This explains the purportedly differing decisions outlined in the State's Petition (see Petition, p. 15). In some instances lower Courts have apparently regarded the duration and nature of a guest's stay alone as sufficient to confer a societally recognized privacy right. See *United States v. McIntosh*, 857 F.2d 466 (Defendant was a guest for several days prior to police entry). Other Courts have required Defendants

[15] Possession of a key is a factor employed by lower Courts in determining an individual's right to control or exclude others. It is not, however, determinative. *United States v. Aguirre*, 839 F.2d 831.



with a more tenuous connection to the dwelling to demonstrate other criteria designed to buttress their privacy claim.[16]

Standing alone, this flexible approach certainly fails to warrant this Court's involvement. Indeed, in its Petition the prosecution fails to advance any new test or criteria which it wishes this Court to adopt, nor does it explicitly suggest that the Minnesota Supreme Court overlooked any of the factors traditionally considered by the Courts in evaluating similar suppression issues. Rather, the essential thrust of the prosecution's claim is that the Minnesota Supreme Court simply erred in its assessment of the factual circumstances underlying Respondent's arrest, that it should have viewed the situation more favorably to the prosecution, and refused to suppress evidence. Claims grounded in a lower Court's resolution of disputed factual issues are ill-suited for issuance of Writs of Certiorari.[17] *General Talking Pictures Corporation v. Western Electric Company*, 304 U.S. 175 (1938), Reh. den. 305 U.S. 675.

[16] The State's Petition cites several decisions purportedly supporting the proposition that "other Courts hold that an overnight guest must also show a right to control access to the premises . . ." (Petition, p. 15). That interpretation of the cited decisions is questionable. For example, in *United States v. Aguirre*, the 1st Circuit concluded that the Defendant did not have a cognizable privacy interest in the dwelling because he could not establish prior usage. There was no evidence that he was, at the time of the seizure, an overnight guest. Similarly, in *United States v. Gomez*, the Defendant's challenge was rejected because he had effectively abandoned the premises. See *United States v. Aguirre*, 839 F.2d 854; *United States v. Gomez*, 770 F.2d 251 (1st Cir. 1985).

[17] Even assuming that some lower Courts have been too lenient in determining privacy expectations and that status as an overnight guest is, in no circumstances, sufficient to create a reasonable expectation of privacy, this case is not well suited to make this holding. The Minnesota Supreme Court relied on several factors, other than the duration of Mr. Olson's stay, to arrive at its conclusion. In addition to his overnight guest status, the Minnesota

## III. The State of Minnesota has failed to establish the existence of an exigent circumstance justifying Respondent's warrantless arrest and the storming of the home in which he stayed.

Petitioner alleges that, even if Mr. Olson possessed a reasonable expectation of privacy in the dwelling at 2406 Fillmore, exigent circumstances justified his warrantless arrest. In particular, the prosecution asserts the Minnesota Supreme Court's decision is contrary to public policy, conflicts with other judicial decisions, and has a faulty basis. Once again, each of these claims is without merit.

### A. The Minnesota Supreme Court's February 24, 1989 decision is not contrary to public policy.

The prosecution argues that the Minnesota Supreme Court's discouragement of warrantless arrests "is not required by the Fourth Amendment and will have the effect of transforming the peaceful neighborhoods into armed camps whenever a felon chooses to hide out there" (Petition, p. 20). Given the specific factual circumstances of Respondent's arrest, this allegation is, to say the least, amusing. The State's assertion that merely seeking an arrest warrant would transform the site of Mr. Olson's arrest into an "armed camp" begs several important questions. First, where would Mr. Olson have obtained a weapon? Although this was a violent crime, the murder weapon was recovered and the suspect who fled the scene was

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Supreme Court noted that Olson intended to stay for an indefinite period, had the right to allow or refuse visitors' entry, kept a change of clothes at the premises, and possessed a subjective expectation of privacy (A-8). Accordingly, adoption of some vaguely-defined yet more stringent standard, as requested by the prosecution, would not necessarily change the result in this case.



unarmed when observed by police. Second, police had no information from their fictitious tipster that Mr. Olson was armed nor did they have any reason to believe that the Bergstroms retained weapons in their home. The record before this Court is absolutely barren of any basis for the State's assertion that Mr. Olson had access to illegal firearms sources as the State now suggests. More importantly, Respondent was, indeed, unarmed when arrested.

Similarly, the State contends that if it delayed Respondent's arrest, he might have entered into an "armed shootout with the police or the taking of a hostage . . ." (Petition, p. 19). Certainly it would have been difficult for Mr. Olson to enter into a "shootout" with the police when he was unarmed. The occupants of the Bergstrom home did not feel threatened—he was their guest. Rather, the only hostages taken at the time of Mr. Olson's arrest were Julie Bergstrom and her mother LouAnn—who were seized and mistreated by police officers (RHT. 184-200).

The reality of this situation, as accepted by the Minnesota Supreme Court, mandates the conclusion that Mr. Olson's warrantless arrest was impermissible. Relying on uncorroborated and uninvestigated information from a fictitious informant, police directed Respondent's arrest. They did so without bothering to even attempt securing an arrest warrant. Officer DeConcini testified at the pre-trial suppression hearing that he had never attempted to obtain an arrest warrant during a weekend (RHT. 130) and added that one consideration underpinning his refusal to do so was his reluctance to disturb local prosecutors on Saturday or Sunday (RHT. 116). The Minnesota Supreme Court's decision properly emphasized to police officers that they should be equally sensitive to the liberty interests of citizens.

**B. The Minnesota Supreme Court's February, 1989 decision is not thematically inconsistent with the decisions of other Courts.**

The Petitioner argues that "several Courts disagree with the Minnesota Supreme Court's encouragement of a stake-out . . ." (Petition, p. 22). In support of this proposition, the State cites several decisions in which warrantless arrests have been sanctioned.

Once again, this argument is misconceived. Absent a specific constitutional exemption, Respondent's warrantless arrest inside a dwelling is presumptively unlawful. *Welsh v. Wisconsin*, 466 U.S. 740. The prosecution bears the burden of establishing that Respondent's arrest falls within one of the narrowly-defined exceptions to this constitutional prohibition. In weighing that obligation, this Court has specifically declared that "police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or seizures." Id. at 749-750. In this action, the prosecution has sorely failed to voice the existence of any "exigent" condition which would sanction Mr. Olson's warrantless arrest. The exigent circumstances necessary to justify a warrantless arrest are those which gravely endanger the lives of the public or police officers. *United States v. Jones*, 635 F.2d 1357 (8th Cir., 1980). This does not mean simply that a violent or dangerous crime has occurred. This Court has generally restricted emergency conditions to hot pursuit of a fleeing felon, *United States v. Santana*, 427 U.S. 38 (1976); destruction of evidence, *Warden v. Haden*, 387 U.S. 294 (1967); or gunplay or danger of gunplay, *Michigan v. Tyler*, 436 U.S. 99 (1978).

Not surprisingly, the Minnesota Supreme Court concluded that none of these dangers or needs were present on July 19,



1987 when police made their warrantless entry into the home on Fillmore.[18] Although there may at one time have been a "hot pursuit" situation, that pursuit had long since concluded. There was no suggestion that Respondent possessed any evidence that was likely to be destroyed if his arrest was delayed while police attempted to obtain a warrant. Further, any danger of gunplay is at best speculative. While a gun was employed in the offense, it was recovered at the scene. Police officers observing the suspects' flight did not notice either carrying a weapon; there was no reason to surmise that Respondent possessed a weapon on July 19, 1987.

The State has never clearly explained which narrowly-tailored exception justified Respondent's warrantless arrest. The tenor of its argument is that since Respondent was involved in a serious offense, police were free to immediately direct his arrest once they had discovered his location and were under no compunction to first obtain an arrest warrant or at least attempt to procure a warrant. As such, the State's position is a direct assault on *Payton v. New York*, 445 U.S. 573 (1980). To mask the intrinsic nature of its argument, the State contends that the Minnesota Supreme Court's decision somehow improperly encourages stake-outs. This issue was convincingly addressed by the Minnesota Supreme Court which admitted "cases from other jurisdictions are split on whether surveillance or a stake-out should be used to gain time

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[18] In determining whether exigent circumstances existed, the Minnesota Supreme Court explicitly employed the *"Dorman"* analysis examining (1) the gravity of the offense, (2) whether the suspect was reasonably believed to be armed, (3) the strength of the State's probable cause showing, (4) the certainty that the suspect is located in the premises about to be entered, and (5) the likelihood of escape if arrest is delayed. *Dorman v. United States*, 435 F.2d 385, 392-393 (D.C. Cir. 1970). Evaluating each factor the Court concluded that the State had simply not met its burden.

to obtain an arrest warrant." The Minnesota Supreme Court reviewed those decisions before issuing its opinion and explained:

> Again the differing circumstances explain the differing results. Sometimes a stake-out will adequately freeze the situation while on other occasions the ensuing delay may increase the dangers of escape or danger to others. LaFave suggests a distinction between an arrest which is planned in advance and an arrest . . . which occurs in the field as part of unfolding developments (citations omitted). Thus, in *Lohnes*, we pointed out that an arrest was the culmination of a rapidly-developing situation in the field with only thirty-five minutes elapsing . . . (A-11).

The Minnesota Supreme Court then examined the specific factual circumstances of Respondent's arrest. The Court reasonably concluded: (1) that police based their decision to arrest Mr. Olson on uncorroborated and uninvestigated allegations from a fictitious tipster; (2) this decision was made several hours before Mr. Olson's actual arrest; (3) police made no effort to obtain an arrest warrant before seizing Respondent; (4) police were able to obtain a search warrant as part of this same investigation within a few hours on the preceding day, Saturday; (5) and the State had failed to adequately explain why an arrest warrant could not have been obtained (A-12). The Minnesota Supreme Court decision seems thoroughly considered and consistent with the themes advanced by other Courts.



### C. The Minnesota Supreme Court's February, 1989 decision is well-reasoned.

The Petitioner argues that the Minnesota Supreme Court "overlooked or misconstrued several important facts . . ." and that as a result, its decision was a product of "faulty reasoning" (Petition, p. 23). If misconception of facts exists, it is on the part of the prosecution. For example, the Petition alleges "police had reason to believe that Respondent still might possess a firearm . . ." What reason? The murder weapon was recovered shortly after the robbery. When Mr. Olson fled he was observed to be unarmed. Even the fictitious tipster did not allege that Mr. Olson possessed a firearm. Similarly, the State contends that the Minnesota Supreme Court "also overlooked the fact that it takes much longer to obtain an arrest warrant (i.e., a murder complaint) than a search warrant (Petition, p. 23).[19] This assertion is entirely unsupported by the trial record. Detective DeConcini never indicated that the time required to obtain an arrest warrant entered into his decision. Indeed, Detective DeConcini had no knowledge of the length of time necessary to obtain an arrest warrant during the weekend since he had never attempted to do so during his twenty years as a police officer. Detective DeConcini explained that he did not wish to disturb prosecutors during their vacation time. These excuses were, understandably, not warmly received by the Minnesota Supreme Court.

The prosecution next contends that "the necessity for quick police action arose after a telephone call into the duplex. . . . The police heard a male, presumably Respondent, instruct Julie to 'tell them I left.'" The prosecution suggests, from this statement, that "police could reasonably have decided that

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[19] The murder complaint initially filed against Respondent is less than four pages in length.

Respondent intended to flee . . ." and "police were justified in entering immediately to prevent Respondent's escape." (Petition, p. 24). Unfortunately, there is no evidence that Respondent ever instructed Julie Bergstrom to mislead police regarding his location.[20] Julie Bergstrom expressly denied hearing Respondent make any such statement (T. 543). Ms. Bergstrom added that the telephone call from Detective DeConcini occurred only after police entered the home to arrest Mr. Olson and that she was unaware of Respondent's location at that time (T. 543). Even Detective DeConcini acknowledged that he could not identify the voice he assertedly overheard (T. 434). Even if true, there is no judicial authority for the proposition that a criminal suspect's unwillingness to voluntarily surrender himself to police constitutes an exigent circumstance. The Minnesota Supreme Court specifically dealt with this concern in its opinion, noting "three or four Minneapolis police cars surrounded the house." The Court then added: "It was evident the suspect was going nowhere. If he came out of the house he would have been promptly apprehended." (A-11).

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[20] Julie Bergstrom, the individual at the other end of the telephone line, contradicted Detective DeConcini's version of the telephone conversation in which the Detective asserted hearing the male background voice. Ms. Bergstrom testified:

Q. Did you have a telephone conversation with Sgt. DeConcini?

A. I did have a conversation with an officer that day *after the police were already in my house.* (Emphasis supplied.)

Q. Did he instruct you or ask you to send Rob Olson outside?

A. Yes.

Q. Did you tell Mr. Olson that?

A. No . . . I don't even know where he was at the time . . . when the police came in I had no idea where he was (T. 543).



## CONCLUSION

Respondent's right to be free from warrantless arrest finds its genesis prior to the enactment of the Constitution itself. In March, 1763, William Pitt the Elder addressed the House of Commons and proclaimed:

> The poorest man may in his cottage bid defiance to all forces of the crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his forces dare not cross the threshold of the ruined tenement.[21]

The Minnesota Supreme Court vindicated Respondent's exercise of that right and its decision may strongly discourage police officers, in the future, from heedlessly ignoring constitutional dictates. For those reasons, Respondent respectfully requests that the Petition for a Writ of Certiorari to review the judgment of the Minnesota Supreme Court be denied.

Dated: _____

Respectfully Submitted,

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[21] See *Payton v. New York*, 445 U.S. at 602 n. 54.

# APPENDIX

## APPENDIX A

STATE OF MINNESOTA
IN SUPREME COURT
C3-88-687

Hennepin County — Simonett, J.
Took no part, Keith, J.

STATE OF MINNESOTA,

Respondent,

vs.

ROBERT DARREN OLSON,

Appellant.

### SYLLABUS

Warrantless entry of defendant's dwelling, in absence of exigent circumstances, requires suppression of defendant's statement and, hence, a new trial.

Reversed and remanded for a new trial.

Heard, considered, and decided by the court en banc.

### OPINION

SIMONETT, Justice.

Defendant Robert Olson appeals his conviction for first degree murder, three counts of armed robbery, and three counts of second degree assault. He claims, among other things, that his arrest was illegal, lacking probable cause and accomplished by a warrantless entry of the place where he was staying. We conclude Robert Olson's constitutional rights were violated by the warrantless entry requiring suppression of tainted evidence, and reverse for a new trial.

On Saturday morning, July 18, 1987, shortly before 6 a.m., a lone gunman robbed an Amoco station in Minneapolis, shooting to death the station manager. The police were quickly alerted and, from the description of the robbery, suspected Joseph Ecker. Two officers drove to Ecker's home, arriving at about the same time as a brown Oldsmobile pulled up. The Oldsmobile tried to escape, spun out of control, and came to a stop. Two white males got out of the car and fled on foot. In short order one of the two men, who proved to be Joseph Ecker and who was identified as the robber-gunman, was captured inside his home. The other man, unidentified but described as tall, thin, a white male in his early twenties with sandy brown hair, escaped. It was now about 6:15 a.m.

Inside the abandoned Oldsmobile police found a sack of money and the weapon soon thereafter identified as the murder weapon. Also in the car was a title certificate showing the Oldsmobile's owner to be Keith Jacobson. The name Rob Olson appeared on the certificate as a secured party but with the name crossed out; the bottom half of the certificate, used to transfer title, was missing. There was also a letter in the car, dated May 11, 1987, from an insurance company, addressed to *Roger R.* Olson, 3151 Johnson Street. A second search of the car pursuant to a search warrant revealed a videotape rental receipt dated July 16, 1987 (2 days earlier), issued to Rob Olson. The police verified that a Robert Olson lived at 3151 Johnson Street. The police talked to Ecker and a woman who had been in the house when Ecker was arrested. Neither identified Robert Olson as having been in the getaway Oldsmobile or connected with the robbery. The woman gave the names of persons who had been with Ecker the night before; Olson's name was not among them. The police were unable to locate Keith Jacobson.



The next day was Sunday, July 19. In the morning a woman called the police and said a man by the name of Rob was the driver of the getaway car and was planning to leave town by bus. The caller gave her name as Dianna Murphy. About noon the woman called again, said she was Dianna Murphy, and gave her address and phone number. She said that a woman named Maria lived on Garfield Northeast and gave Maria's phone number. Maria, she said, had told her that a man named Rob had admitted to Maria and to two other women, Louanne and Julie, that he was the driver in the Amoco robbery. The caller said Louanne was Julie's mother and the two women lived at 2406 Fillmore Northeast.

The detective-in-charge who took the second telephone call did not attempt to verify the identity of the caller. If he had, he would have learned no one by the name of Diana Murphy lived at the address and phone number given. Neither was Maria contacted. The detective did, however, send police officers to 2406 Fillmore to check out Louanne and Julie. The Fillmore address proved to be a duplex. Louanne Bergstrom and her daughter Julie resided in the upper unit but were not home. Louanne's mother (Julie's grandmother) lived in the lower unit. She confirmed that a Rob Olson had been staying upstairs and promised to call the police when Olson returned. The grandmother was not aware of Olson's involvement in any robbery. A pickup order was then issued for Olson's arrest.

About 2:45 p.m., the grandmother called police and said Olson had returned. The detective then instructed police officers to surround the house. No effort was made to obtain an arrest warrant. The detective later explained in court that he had never attempted to get an arrest warrant on a weekend during his 20 years on the force. After the house was surrounded, the detective phoned Julie and told her Rob should

come out of the house. The detective heard a male voice say "tell them I left." Julie then said that Rob had left, whereupon the detective ordered the police to enter the house. They did so with drawn weapons and without seeking permission. Defendant Olson, age 19, was found hiding in a closet.

After his arrest, defendant admitted to the police that he had driven Joseph Ecker from Ecker's house to an apartment building on Second Avenue Southeast near the Amoco station on University Avenue. Olson said Ecker had asked for a ride to pick up a girlfriend; that on the way he stopped at the Amoco station to buy cigarettes and pop; and that he then parked by the apartment building about a block from the station. He said Ecker was gone about 10 minutes and returned with a gun and a bag and ordered Olson to drive him home. Olson said he fled from the police at the Ecker house because he was scared of Ecker. Subsequent investigation disclosed that Olson had bought the Oldsmobile from Keith Jacobson but title had not yet been transferred. Defendant's defense at trial was that he had been duped into driving Ecker to the scene of the robbery.

The two main issues on appeal concern the legality of defendant's arrest. Was there probable cause? Did circumstances justify a warrantless, nonconsensual entry of the duplex? Defendant argues both these questions must be answered no, and, therefore, evidence obtained from his arrest—most importantly, his statement to the police—should have been suppressed.

I.

When police have arrested a suspect without a warrant, the test is whether the officers in the particular circumstances, conditioned by their own observations and information and guided by the whole of their police experience, reasonably



could have believed that a crime had been committed by the person to be arrested. *State v. Merrill*, 274 N.W.2d 99, 108 (Minn. 1978). A determination of whether the police had probable cause to arrest is a determination of constitutional rights, and this court makes an independent review of the facts to determine the reasonableness of the police officer's actions. *See Ker v. California*, 374 U.S. 23, 34 (1963).

At the time of defendant's arrest the police knew that a robbery-homicide had occurred. They had arrested one suspect, Joseph Ecker, and had a description of the unknown driver. In the getaway car was a certificate of title listing Keith Jacobson as the car's owner. The name Rob Olson was on the title certificate but as a secured party and the name was crossed out. A receipt for a videotape rental, dated 2 days earlier, was also in the car, issued to Robert Olson.

The trial court found that this physical evidence alone, without the informant's tip, was sufficient to establish probable cause. We have our doubts. As defendant points out, this evidence only suggested Olson might have had some property or lien interest in the getaway car and that he may have ridden in the car 2 days before the robbery. Keith Jacobson would seem to have been a more likely suspect. Significantly, although the police had this physical evidence on Saturday, they did not issue a pick-up order for Olson until Sunday, after receiving the telephone tip from "Dianna Murphy."

Consequently, the question becomes whether the tip was reliable and if it together with the physical evidence establishes probable cause. In evaluating an informant's tip, the court looks at the commonsense totality of the circumstances, including the informant's veracity, reliability, and basis of knowledge. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). In this case, the police knew nothing about the informant's identity

or reliability. If the police had called the number "Dianna Murphy" gave them or checked her name in the telephone directory, they would have found there was no such person. The caller did not claim any personal knowledge of the information related, simply passing on what she had apparently been told by Maria, another unidentified source. On the other hand, the police did verify that at least part of the information given was correct, namely, that two women named Louanne and Julie lived at the address given and that a Rob Olson was staying there. The police also knew that the getaway car was connected in some way with a man named Rob Olson, which lent credence to the informant's statement that Rob Olson was the driver of the getaway car.

"[T]he fact that police can corroborate part of the informer's tip as truthful may suggest that the entire tip is reliable." *State v. Siegfried*, 274 N.W.2d 113, 115 (Minn. 1978). In *Siegfried*, however, the informant was known to the police as a reliable private citizen and had obtained the reported information by personal observation; further, the information had been accepted by a magistrate in granting an application for a search warrant. *See also State v. Wiley*, 366 N.W.2d 265 (Minn. 1985) (corroboration on a non-key item and informant had history of past reliability). The trial court here relied on *State v. Causey*, 257 N.W.2d 288 (Minn. 1977); but in *Causey* a magistrate had found probable cause for issuing a search warrant based on information supplied by a known reliable informant who accompanied the officer to the defendant's residence, where a car registered to a convicted drug possessor was parked. *Cf. State v. Eling*, 355 N.W.2d 286 (Minn. 1984) (police made extensive efforts verifying informant's identity and source of information). Nevertheless, there is force to the state's argument in this case that "Dianna



Murphy's" tip was sufficiently corroborated so that, together with other known information, there was probable cause.

A review of our cases reveals, what should come as no surprise, that the "totality of the circumstances" test is fact-specific. In this case we conclude we need not resolve the probable cause issue because the issue of warrantless entry, which we next discuss, proves to be dispositive.

II.

Defendant claims the warrantless entry of the duplex at 2406 Fillmore to seize him was a violation of his fourth amendment rights. The state counters that defendant lacks standing to make this challenge; but, even if standing exists, exigent circumstances justified the warrantless entry of the duplex. We conclude defendant's constitutional rights were violated.

It is unclear why an arrest warrant was not obtained in this case, particularly since we have encouraged law enforcement officers to obtain a warrant whenever possible. *See Merrill*, 274 N.W.2d at 108. The previous day, Saturday, the police had no difficulty in obtaining a search warrant for the car in 2 1/2 hours. Here, however, apparently no attempt was made to obtain an arrest warrant because it was Sunday, surely a curious reason for not observing the constitutional safeguards of citizens.

A.

For defendant Olson to challenge the warrantless entry and seizure of his person at Louanne's house, he must show a legitimate expectation of privacy in the upper duplex at 2406 Fillmore. *See State v. Brown*, 345 N.W.2d 233, 237 (Minn. 1984). For some days prior to the robbery, Olson had been living with Ecker at 2420 Polk. On Friday night he did not return to Ecker's house until 4:30 a.m., having been out on a

date. On Saturday night Olson did not return to Ecker's house, nor to his own, because he was afraid of being arrested; instead he stayed that night at Louanne Bergstrom's duplex. The trial court found that Olson had no reasonable expectation of privacy in the 2406 Fillmore residence. The court said Olson was not a tenant; that he had no possessions at the duplex except for a change of clothes; and that he slept on the floor. This ruling ignores, however, the fact that Olson had permission to stay at 2406 Fillmore for some indefinite period, and that Louanne Bergstrom testified Olson had the right to allow or refuse visitors entry. While the United States Supreme Court has rejected the notion that anyone legitimately in a dwelling automatically has standing to challenge an illegal search, *Rakas v. Illinois*, 439 U.S. 128, 142 (1978), this does not mean that a guest never has standing. *See also United States v. Salvucci*, 488 U.S. 83 (1980) (overruling the holding in *Jones v. United States*, 362 U.S. 257 (1960) that possession of a seized good creates standing). Indeed, this case is quite similar to *Jones*, where an expectation of privacy was found. Jones had permission to stay at a friend's apartment; he had a key; he had a change of clothes; his home was elsewhere; and he had slept at the friend's apartment for "maybe a night." *Id.* at 259. Although the *Rakas* court subsequently qualified the rationale of *Jones*, it expressly reaffirmed the factual holding of that case. *Rakas*, 439 U.S. at 142-43. *See also Steagald v. United States*, 451 U.S. 204, 230-31 (1981) (Rehnquist, J., dissenting).

The trial court thought it significant that Olson was trying to evade the police so that his presence at 2406 Fillmore was "wrongful." Not so. A reasonable expectation of privacy is not forfeited (nor to be emasculated) because of the defendant's motives for seeking privacy. As LaFave explains, "to deny standing merely because it turns out the defendant had



a criminal purpose is in sharp conflict with the rationale underlying the exclusionary rule." 4 W. LaFave, *Search and Seizure* § 11.3(b) at 299 (2d ed. 1987).

Finally, the state argues that defendant had no *actual* expectation of privacy. In *Smith v. Maryland*, 442 U.S. 735, 740 (1979), the United States Supreme Court said that to challenge an illegal search a defendant must have an actual expectation of privacy as well as one that society is prepared to recognize as reasonable. The trial court thought that defendant's statement to Julie, "tell them I've left," indicated that defendant had no actual expectation of privacy at 2406 Fillmore. We think not. This statement more likely suggests that defendant was simply attempting to discourage the police from invading his privacy by giving them a further reason, albeit of doubtful plausibility, not to enter the house.

We hold that defendant has standing to challenge the legality of his arrest.

B.

The right to be secure in the place which is one's home, to be protected from warrantless, nonconsensual intrusion into the privacy of one's dwelling, is an important fourth amendment right. *See, e.g., Welsh v. Wisconsin*, 466 U.S. 740, 749 (1984); *State v. Storvick*, 428 N.W.2d 55, 61 (Minn. 1988). To justify a warrantless arrest in a defendant's home, the state must show urgent need, *i.e.*, the presence of exigent circumstances. We make our own evaluation of the found facts (which in this case are not in dispute) in concluding whether exigent circumstances exist. *Storvick*, 428 N.W.2d at 58 n. 1. In making this determination, we have used the so-called *Dorman* analysis, with the understanding that the *Dorman* factors are part of a flexible approach that encompasses all relevant circumstances. *State v. Lohnes*, 344 N.W.2d 605, 611

(Minn. 1984).[1] Thus, a warrantless intrusion may be justified by hot pursuit of a fleeing felon, or imminent destruction of evidence, *Welsh*, 466 U.S. 740, or the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling. *Lohnes*, 344 N.W.2d 605; *State v. Hatcher*, 322 N.W.2d 210 (Minn. 1982).

In this case the state claims exigent circumstances for a warrantless arrest in Louanne's duplex because defendant was a suspect in a murder, guns had been found in the getaway car, defendant had fled the police once, and there was information that he might try to flee again.

While it is true a grave crime was involved, it is also true that the suspect was known not to be the murderer but thought to be the driver of the getaway car. Probable cause to believe the suspect was the driver depended, as we have seen, in large part on the reliability of the unknown informant. The police had already recovered the murder weapon. The suspect had not left town by bus, at least not yet, as the telephone tip had indicated, but had returned to the duplex where he had stayed the previous night. The police knew that Louanne and Julie were with the suspect in the upstairs duplex with no suggestion of danger to them. Three or four Minneapolis police squads surrounded the house. The time was 3 p.m., Sunday.

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[1] The *Dorman* analysis considers: (a) whether the offense is a grave offense, particularly a crime of violence; (b) whether the suspect is reasonably believed to be armed; (c) whether the showing of probable cause connecting the defendant to the offense is more than minimal; (d) whether the police have strong reason to believe that the suspect is in the premise being entered; and (e) whether there is a likelihood that the suspect will escape if not swiftly apprehended. *Dorman v. United States*, 435 F.2d 385, 392-93 (D.C. Cir. 1970).



We do not think the particular circumstances of this case amount to exigent circumstances. It was evident the suspect was going nowhere. If he came out of the house he would have been promptly apprehended. This case is unlike *Lohnes*, for example, where the suspect was believed to have committed the crime of violence, probable cause was strong, and the weapon had not been found. In *Lohnes*, too, the dwelling was in an isolated rural area, distant from a magistrate, the time 5 a.m., and it was doubtful if sufficient police resources were on hand to contain the suspect until an arrest warrant could be obtained. *Lohnes*, 344 N.W.2d at 611-12.

Cases from other jurisdictions are split on whether surveillance or a stake-out should be used to gain time to obtain an arrest warrant. *See* 2 W. LaFave, *Search and Seizure* § 6.1(f), at 605-08 (2d ed. 1987). Again, the differing circumstances can explain the differing results. Sometimes a stake-out will adequately freeze the situation, while on other occasions the ensuing delay may increase the chance of escape or danger to others. LaFave suggests a distinction between an arrest which is planned in advance and an arrest in medias res, which occurs in the field as part of unfolding developments. *Id.* Thus, in *Lohnes*, we pointed out that the arrest was the culmination of a rapidly developing situation in the field, with only 35 minutes elapsing from the time the sheriff attempted to locate the suspect to the warrantless arrest of the suspect at his home. *Lohnes*, 344 N.W.2d at 611. *See also Welsh*, 466 U.S. at 761 (White, J., dissenting) ("The decision to arrest without a warrant typically is made in the field under less-than-optimal circumstances * * *."). Where, however, the arrest is planned in advance, it is less likely the police can claim exigent circumstances.

Shortly after 1 p.m. on Sunday the detective in charge talked with Julie's grandmother on the telephone and learned that a Rob Olson "had been staying upstairs for a day or two with Louanne and Julie," and he obtained the grandmother's promise to call if Rob returned to the house. At 2 p.m. the detective issued a pick-up order for Olson, what he called a "probable cause arrest bulletin." The police were instructed to stay away from the duplex. At 2:45 p.m. the grandmother called the detective again to report Rob had returned. Squad cars were sent to the duplex and, at 3 p.m., the detective (coordinating the arrest efforts from headquarters by radio and telephone) ordered entry of the duplex. Olson was brought to headquarters within an hour. By then the detective who had been in charge was gone. He went off duty at 3 p.m. At least by 2 p.m., then, the police had made plans for Olson's arrest at the dwelling where he was staying at such time as Olson might return. Nevertheless, in the hour that elapsed before any arrest could be made at the duplex, no effort was made to obtain an arrest warrant to enter the dwelling. We do not know if a warrant could have been obtained within that hour, or within a relatively short time thereafter; on the other hand, the state has not suggested the warrant could not have been obtained. We do know a search warrant was obtained on Saturday, the day before, in 2 1/2 hours when the urgency to search an already impounded car was much less.

A warrantless, nonconsensual intrusion of one's dwelling is not to be lightly regarded; indeed, such an entry is considered presumptively unreasonable, and the United States Supreme Court has stressed the state bears a "heavy burden" to establish exigent circumstances. *Welsh*, 466 U.S. at 749. In this particular case, considering all the circumstances, we do not think that burden has been met. We hold defendant's fourth amendment rights were violated.



C.

Defendant asks that all evidence obtained from the illegal arrest be suppressed. This includes Olson's statement, the statements of all persons present at 2406 Fillmore at the time of his arrest, and Joseph Ecker's statement which was obtained after the police showed him Olson's statement. Evidence obtained as a result of an illegal arrest must be suppressed unless it is obtained by means sufficiently distinguishable from the illegal exploitation to be purged of the primary taint. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). Here Olson was taken immediately to police headquarters, and the police obtained a statement from him within an hour of his illegal arrest. We believe the statement was tainted and must be suppressed.

While the state has not argued that Olson's statement was untainted, it does argue that admission of Olson's statement at trial was harmless beyond a reasonable doubt. *See State v. Forcier*, 420 N.W.2d 884, 886-87 (Minn. 1988). There was other evidence, says the state, to establish that Olson was the driver of the getaway car, and Olson's statement had no significant impact on the guilty verdicts. At trial, however, the state relied heavily on various details in Olson's statement to point out discrepancies in his story; these discrepancies were then used to argue that Olson was lying about being duped by Ecker. For example, in his statement Olson said he was in the Amoco station about 10 minutes before the robbery to buy cigarettes and pop but the surveillance videotape showed no customer in the store at that time. In final argument, the prosecutor told the jury, "Now the proof of the pudding here, ladies and gentlemen, is in this statement"; and the prosecutor then went on, point by point, to show where Olson's statement did not appear to square with other facts. Olson's cred-

ibility was a key issue at trial and use of his statement obtained as a result of the illegal arrest was not harmless error.

We reverse and remand for a new trial. As we have mentioned, defendant claims there is other evidence which should also be suppressed along with his statement. He supports his claim only by assertion, and the record before us is unenlightening. The trial court on remand will be in a better position to deal with these claims. We need not reach other issues raised by defendant in this appeal.

Reversed and remanded for a new trial.

KEITH, Justice, took no part in the consideration or decision of this case.



## APPENDIX B

C3-88-687

STATE OF MINNESOTA
IN SUPREME COURT

STATE OF MINNESOTA,
Petitioner-Respondent,
vs.
ROBERT DARREN OLSON,
Respondent-Appellant.

## DEFENDANT'S REPLY TO STATE'S PETITION FOR REHEARING

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## STATEMENT OF THE CASE

For purposes of this Reply, Appellant accepts the Statement of the Case contained in the State's Petition for Rehearing (State's Petition, p. 1).

## ARGUMENT

I. This Court properly concluded that Appellant's warrantless arrest on July 19, 1987, invaded his Fourth Amendment right.

The State argues that Appellant does not have "standing" to challenge the unlawful nature of his arrest and that this Court's decision virtually eliminates "the standing requirement" in Minnesota. Certainly Fourth Amendment rights are personal and may not be vicariously asserted. *Brown v. United States*, 411 U.S. 223, 230 (1973). Accordingly, Appellant's challenge in this proceeding requires that a right, personal to him under that amendment be transgressed.

Traditionally courts have viewed this concept as "standing" to challenge a search or seizure. Given the continuing evolution of constitutional law, the catch phrase "standing" is no longer entirely accurate. Beginning in *Katz v. United States*,



the Supreme Court focused its analysis of the Fourth Amendment's scope on an individual's privacy expectations. Commenting that "the Fourth Amendment protects people not places" the Supreme Court explained that whenever a person possesses a reasonable expectation of privacy in a particular context he can avail himself of the protection granted by the Fourth Amendment. 389 U.S. 347, 352 (1967).

In essence, the State simply challenges this Court's conclusion, that Mr. Olson possessed a legitimate expectation of privacy in the home located at 2406 Fillmore. The State advances no new arguments in support of this assertion. Rather the State's Petition repeatedly suggests that this Court's decision is thematically inconsistent with *Rakas v. Illinois*, 439 U.S. 128 (1978).

Presumably this Court examined and considered *Rakas* before publishing its opinion. Certainly both parties cited that decision in their Briefs.[1] The Court's February 24, 1989 decision repeatedly cited *Rakas v. Illinois* in support of Appellant's claims. Indeed, that opinion construed *Rakas*, as rejecting "the notion that anyone legitimately in a dwelling automatically has standing to challenge an illegal search. . ." but added ". . . this does not mean that a guest never has standing . . ." and "although the *Rakas* court subsequently qualified the rationale of *Jones* it expressly reaffirmed the factual holding of that case . . ." (A. 7).

That construction of *Rakas* can hardly be considered inaccurate. In that decision Chief Justice Rehnquist commented:

> We think that *Jones* on its facts merely stands for the unremarkable proposition that a person can have a legally sufficient interest in a place other than his own home so

[1] Appellant's July 25, 1988 Brief cites that decision at p. 21, the State's September 27, 1988 Brief cites *Rakas* at p. 17.

> that the Fourth Amendment protects him from unreasonable government intrusion into that place (citations omitted). In defining the scope of that interest we adhere to the view expressed in *Jones* and echoed in later cases that arcane distinctions developed in property and tort law between guests, licensee's, invitee's and the like ought not to control.

439 U.S. at 142-143. Yet the State's Petition expressly invites this Court to reinvigorate these technical criteria as a focal point of constitutional analysis. From the State's perspective, Appellant had no reasonable expectation of privacy in this dwelling simply because he did not have a key to the premises. (State's Petition, p. 3).[2] Suggesting that a guest in a dwelling possesses a reasonable expectation of privacy only if he has a key and "complete control over the premises" once again supplants privacy expectations with mechanistic concepts. To permit an accused to challenge the validity of an arrest only if he or she possessed a key to the dwelling where the seizure occurred runs contrary to the analytical constructs of both *Rakas* and *Jones*. In particular, Chief Justice Rehnquist noted:

> . . . capacity to claim the protection of the Fourth Amendment depends not on a property right in the invaded place but upon whether the person who claims the

[2] Appellant's warrantless arrest is presumptively unlawful and the prosecution bears the burden of establishing the validity of that arrest. *Welsh v. Wisconsin*, 466 U.S. 740 (1984). The State's Petition for Rehearing blithely asserts that Appellant did *not* have a key to the premises. There is no support for that assertion in the Rasmussen Hearing Transcript. Unfortunately the prosecutor failed to inquire, of any witness, including Appellant, if he received a key to the premises from Louanne or Julie Bergstrom. Under the circumstances, if the State considered Appellant's receipt of a key to be crucial to the issue of "standing" it should have made this inquiry at the time.



> protection of the Amendment has a legitimate expectation of privacy in the invaded place (citations omitted). Viewed in this manner the holding in *Jones* can thus be explained by the fact that *Jones* had a legitimate expectation of privacy in the premises he was using and therefore can claim the protection of the Fourth Amendment with respect to a government invasion of those premises even though his interests in those premises might not have been a recognized property interest at common law.

*Rakas v. Illinois*, 439 U.S. at 143. Similarly in *Jones v. United States*, 362 U.S. 257 (1960) the United States Supreme Court declared:

> We are persuaded however that it is unnecessary and ill advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical . . . Distinctions such as those between 'lessee', 'licensee', 'invitee', and 'guest' often only of gossamer strength ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards.

*Id.* at 265-66.

Yet that is precisely what the State suggests this Court do by inviting it to find possession of a key as "crucial" to privacy expectations.[3] Plainly, this Court analyzed the testimony

[3] Contrary to the State's assertion possession of a key was only one factor apparently considered by the Court in *Jones v. United States*. See *Jones v. United States*, 362 U.S. at 259, *Rakas v. Illinois*, 439 U.S. at 141. This is hardly surprising. The author of this document employs a cleaning person who possesses keys to my dwelling. This individual is present for but a few hours each

of all witnesses and properly concluded that Mr. Olson had a reasonable expectation of privacy in the premises at 2406 Fillmore. Its opinion noted that Mr. Olson kept a change of clothes at the premises, that he had permission to stay for an indefinite period, and that he had the right to allow or refuse visitors entry. (A. 7). These conclusions are amply documented in the Rasmussen Hearing Transcript (R.H.T. 184, 192, 198, 217, 220). In particular Mr. Olson testified:

Q: Did you intend to continue staying at that address?

A: Yes.

Q: And did you have any other place to stay?

A: No, I did not.

Q: Were you ever asked to leave by the Bergstroms?

A: No, I was not . . .

Q: . . . When you talked to your friends, if you told them to meet you some place, where would you tell them to meet you?

A: I told them to meet me at that address.

Q: If you told them to call you on the telephone, what number would you give them?

A: Julie's number. (R.H.T. 217-218).

In reality, the focus of the State's complaint is that this Court's use of the exclusionary rule will provoke "public outrage and distrust of the criminal justice system" and "broadening Fourth Amendment protections to persons . . . like Olson is not worth that social cost." (State's Petition, p. 4). This argument is patently offensive. In their haste to arrest Mr. Olson without a warrant, Minneapolis Police Officers failed

month. She receives no guests, telephone calls or messages at this address. She does not sleep there nor consume meals on the premises. Incredibly, under the State's analytical framework, this cleaning person would have a greater expectation of privacy than Appellant simply because she has a key to the property.



to follow even the simplest investigatory procedures, recklessly and negligently relied on false information from a fictitious informant, and directed the storming of a dwelling by armed officers bearing shotguns and revolvers. Now the State suggests that prohibiting use of evidence derived from such conduct is likely to spur "public outrage", "distrust of the criminal justice system", and that protecting Appellant's rights is "not worth that social cost." [4] In *Mapp v. Ohio*, 367 U.S. 643, 659 (1961), the United States Supreme Court eloquently rebutted the underpinnings of this philosophy:

> . . . There is another consideration—the imperative of judicial integrity. The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws or worse its disregard of the charter of its own existence.

II. The State has failed to establish the existence of any exigent circumstance justifying Appellant's warrantless arrest.

[4] At the Rasmussen Hearing Louanne Bergstrom testified that she opened the door of her home to police officers armed with drawn revolvers and shotguns and that she felt powerless to refuse them entry (RHT. 184-185). Julie Bergstrom testified that she believed herself seized by officers and described her treatment as follows:

> . . . They were holding me in a room upstairs when they were searching for Rob and a lady officer dragged me down the stairs against my will and another lady outside was searching under my skirt, lifting my skirt all the way up. My mom asked if she could drive us down to the police station and they refused. They said no, that we had to ride in the squad car. I figured that if we were being taken against our will then they must have to read me my rights. (RHT. 198).

Not surprisingly, Ms. Bergstrom testified she believed herself mistreated and was frightened. However she was mistreated and frightened by police officers—not Appellant (RHT. 200). Appellant respectfully suggests that inhibiting conduct of this nature by police officers is worth the "social cost" of the exclusionary rule.

The State's petition also asserts that even if Appellant has authority to assert a Fourth Amendment claim in this instance, exigent circumstances sanctioned his warrantless arrest. Each one of those "exigent circumstances" was mentioned in the State's initial Brief (Respondent's Brief, p. 18 n. 6). Appellant's Reply Brief noted the rather obvious shortcomings in the State's position (Appellant's Reply Brief, pp. 10-12). Accordingly, this portion of the State's Petition for Rehearing does nothing but reiterate arguments which have already been rejected by this Court (A. 9-10).

Ignoring the specific factual circumstances of Mr. Olson's arrest, the State's Petition engages in a stream of speculative rhetoric in a blatant attempt to disguise the reality of police conduct. For example, the State admits that the weapon involved in this action was recovered but asserts that "police were justified in assuming that Olson too might be armed . . ." because "Olson had ample opportunity after his escape from police to obtain a firearm. . .". This speculation begs several important questions. First, where could Mr. Olson have obtained such a weapon? Certainly if he had returned to the home at 2420 Polk Avenue he would have been arrested with Mr. Ecker. Second, police had no information from their fictitious tipster that Mr. Olson was armed nor did they have any reason to believe that the Bergstrom's retained weapons in their home. The record before this Court is absolutely bereft of any basis for the State's assertion that Mr. Olson had access to illegal firearms sources as the State now suggests. Most importantly, Appellant was, indeed, unarmed when arrested.

Similarly, the State contends that if it delayed Appellant's arrest he might have entered into "an armed shootout with the police or the taking of a hostage. . ." Certainly it would have been difficult for Mr. Olson to enter into a "shootout" with



police when he was unarmed. The occupants of the Bergstrom home did not feel threatened by Mr. Olson—he was their guest. Rather the only "hostages" taken at the time of Mr. Olson's arrest were Julie Bergstrom and her mother Louanne—who were seized and mistreated by police officers. (RHT. 184-200).

Finally, the State argues that the County Attorney's need for leisure time constitutes an "exigent circumstance." (State's Petition, p. 6). This argument is certainly consistent with the Rasmussen Hearing testimony of Detective DeConcini who stated that he had never even attempted to obtain an arrest warrant during a weekend (RHT. 130) and added that one consideration underpinning his refusal to do so was his reluctance to disturb county attorneys on Saturday or Sunday. (RHT. 116). This Court's decision properly emphasized to police officers that they should be equally sensitive to the liberty interests of citizens.

## CONCLUSION

For the foregoing reasons Appellant respectfully requests that this Court deny the State's Petition for Rehearing and award attorney's fees in the amount of $500.00 pursuant to Minn. R. Civ. App. P. 140.03.

Dated: 3/10/89

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No. 88-1916

IN THE

# Supreme Court of the United States

October Term, 1988

STATE OF MINNESOTA,

*Petitioner,*

vs.

ROBERT DARREN OLSON,

*Respondent.*

## BRIEF OF THE STATES OF CONNECTICUT, DELAWARE, INDIANA, KANSAS, MICHIGAN, MISSISSIPPI, MISSOURI, NEW MEXICO, SOUTH CAROLINA AND VERMONT, THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, AND THE MINNESOTA COUNTY ATTORNEYS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE STATE OF MINNESOTA'S PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

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## INTEREST OF AMICI

This brief is submitted by the amici States of Connecticut, Delaware, Indiana, Kansas, Michigan, Mississippi, Missouri, New Mexico, South Carolina and Vermont, the National District Attorneys Association (NDAA), and the Minnesota County Attorneys Association (MCAA) pursuant to Sup. Ct. R. 36.1 and 36.4 in support of the State of Minnesota's petition for a writ of certiorari.[1]

The interests of all the amici states are similar. The first issue raised in the petition is when a guest in another's home has a legitimate expectation of privacy. Many persons accused of violent crimes are highly mobile. Not infrequently, the evidence implicates a particular person and the police learn that, at least for the moment, they may be able to arrest him in another's home. The lower courts' decisions about when a guest has a legitimate expectation of privacy are inconsistent and the area is quite unsettled. Further guidance by this Court, such as the articulation of an explicit set of factors, would clarify matters and eliminate the need for prosecutors to revisit continually the same ground in the lower courts.

Also raised in the petition is the issue of exigent circumstances. This is closely related to the first issue, i.e. whether a guest has a legitimate expectation of privacy, because "the more fleeting a suspect's connection with the premises, such as when he is a mere visitor, the more likely that exigent circumstances will exist . . . ." *Steagald v. United States*, 451 U.S. 204, 231 (1981) (J. Rehnquist dissenting). If this Court should reach this issue, it could clarify the law and help prosecutors advise police agencies.

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[1] Pursuant to Rule 36.1, written consent of the parties to the filing of the brief by the amici associations is being filed at the same time as this brief. The amici states are sponsored by their respective attorneys general and therefore, pursuant to Rule 36.4, consent for them is not necessary.



The NDAA is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publications, and amicus curiae activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens. MCAA is the statewide organization representing all felony prosecutors in Minnesota and has some purposes similar to those of the NDAA, with a particular focus on the criminal justice system in Minnesota.

## SUMMARY OF ARGUMENT

### I.

The Minnesota Supreme Court held that respondent had "standing," as a guest, to challenge his warrantless arrest in the home of another. This Court has held that whether a guest has a legitimate expectation of privacy cannot be determined by a "bright line" rule and that the issue must be developed on a case-by-case basis. *Rakas v. Illinois*, 439 U.S. 128 (1978).

The lower courts have each developed their own, often inconsistent, lists of factors. This case is a good one in which to articulate appropriate factors or provide other guidance to achieve greater consistency.

### II.

The Minnesota Supreme Court also held there were not exigent circumstances. Police officers in the field need cogent guidance so that they know when they can rely on the exigent circumstances exception.

*Payton v. New York*, 445 U.S. 573 (1980) left the initial application of the exigent circumstances exception to the lower

courts. *Welsh v. Wisconsin*, 466 U.S. 740, 749 (1984). However, in the nine years since *Payton*, there have been many lower court decisions on the issue. *See* State of Minnesota's petition at 21-23. The facts and analyses available from these decisions would afford this Court a context and perspective from which to provide guidance and direction on the issue.

## ARGUMENT

### I. THIS COURT SHOULD GRANT THE PETITION SC THAT IT CAN ARTICULATE AND DISCUSS THE APPROPRIATE FACTORS TO CONSIDER IN DECIDING WHETHER A GUEST HAS A LEGITIMATE EXPECTATION OF PRIVACY.

This case raises the issue of when a guest in someone else's home has a legitimate expectation of privacy under the Fourth Amendment. The Minnesota Supreme Court held that respondent had "standing" to challenge his warrantless arrest in Louanne Bergstrom's duplex. The court relied upon two facts: first, respondent had permission to sleep overnight on the floor at Bergstrom's home; and second, he purportedly had the right (a fact which is unsupported in the record) to allow or refuse entry to visitors. *See* Petitioner's Appendix at A-8.

#### A. This Question Must Be Addressed On A Case-by-Case Analysis.

*Rakas v. Illinois*, 439 U.S. 128 (1978) rejected the "bright line" rule of "legitimately on the premises" and held that the question of when a guest has a legitimate expectation of privacy will have to be developed by a case-by-case analysis. *See*



discussion at 439 U.S. 144-148.[2] The development of a case-by-case analysis necessarily entails analyses and decisions by the lower courts in order to identify pertinent factors and to develop analyses based on a broad range of factual situations. However, as the following discussion shows, the lower court decisions are inconsistent and it is now appropriate for this Court to give some more direction to the case-by-case analysis.

#### B. The Lower Courts Have Been Considering Widely Disparate Factors.

In 1982, *United States v. Lochan*, 674 F.2d 960, 964 (1st Cir. 1982) observed:

> [T]he standards for determining how far a defendant's personal fourth amendment rights extend, the limits of what constitute a reasonable expectation of privacy, are not yet settled.
>
> . . . The *Rakas* Court did not, however, specifically set out the factors that bear on the existence of a reasonable expectation of privacy, but it did make several points.

Based upon this perception, the lower courts have articulated their own factors, either explicitly or implicitly. *See, e.g., United States v. Aguirre*, 839 F.2d 854 (1st Cir. 1988); *United States v. Echegoyen*, 799 F.2d 1271 (9th Cir. 1986); *United States v. Haydel*, 649 F.2d 1152 (5th Cir. 1981); *United States v. Lochan*, 674 F.2d 960 (1st Cir. 1982); *United States v. McIntosh*, 857 F.2d 466 (8th Cir. 1988); *United States v. Perez*, 700 F.2d 1232 (8th Cir. 1983), *cert. denied*,

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[2] *See also United States v. Salvucci*, 448 U.S. 83, 92 (1980), which implicitly rejected possession of a seized good as a "bright line":

> We simply decline to use possession of a seized good as a substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched.

468 U.S. 1217 (1984); *United States v. Rackley*, 742 F.2d 1266 (11th Cir. 1984). It is apparent that these cases do not all consider the same factors. The factors listed or discussed by these seven cases, for example, include:

1. Ability or right to exclude other persons from the premises that was searched, whether based upon property rights or upon other considerations. (*Aguirre*, *Haydel*, *Lochan*, and *Rackley*.)
2. The accused's historical (or prior) use of the property that was searched. (*Aguirre*; *see also*, *McIntosh*, *Perez*, and *Rackley*.)
3. The legitimacy of and reasons for the accused's presence, if any, in the searched area. (All seven cases.)
4. The presence or absence of the accused's personal effects at the searched premises and how long they were kept there. (*Perez*, *Rackley*, and *McIntosh*.)
5. The precautions taken by the accused to develop and maintain his privacy in the premises. (*Haydel*.)
6. The accused's subjective expectation of privacy and the reasonableness of that expectation. (*McIntosh*, *Haydel*, and *Lochan*.)
7. The accused's property rights in any property that was seized. (*McIntosh*, *Haydel*, and *Lochan*.)
8. The accused's control of the seized property. (*McIntosh*; *see also*, *Echegoyen*.)

*Rakas* said this about the ability to exclude others from the premises, which is the first factor listed above:

> One of the main rights attaching to property is the right to exclude others, see W. Blackstone, *Commentaries*, Book 2, ch. 1, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude.



439 U.S. at 144, n. 12.[3] On the other hand, one who cannot exclude others will often have little expectation of privacy. The significance of this factor is apparent. Yet three of the seven cases cited above do not consider or address the right to exclude others. *See Echegoyen*, *McIntosh*, and *Perez*. As for the Minnesota Supreme Court in this case, it considered the right-to-exclude factor in only the most cursory fashion. *See* Petitioner's Appendix at A-8. And it did not discuss at all many of the other factors listed above, or any of the seven cases cited as examples herein.

All courts should consider the same relevant factors and arrive at consistent results in determining whether a guest has a legitimate expectation of privacy in another's premises. Unfortunately, they do not. The disparate results are exemplified by *United States v. Rackley*, *United States v. Perez*, and this case.

In *Rackley*, the accused had a key; in *Perez*, he did not; in this case respondent did not.[4] In *Rackley*, the property's lessee testified that the accused had the right to exclude other people from the house; in *Perez*, there was no such testimony; in this

---

[3] *See also*:

(1) *Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980): "Nor did petitioner have any right *to exclude* other persons from access to Cox's purse." (Emphasis added.)

(2) *United States v. Salvucci*, 448 U.S. 83, 91 (1980): "While property ownership is clearly a factor to be considered . . . [citing the just-quoted footnote from *Rakas*, which includes possession of property and the right to exclude]."

[4] The accused has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure. *Rakas v. Illinois*, 439 U.S. at 131, n. 1. The opinion in *Perez* makes no mention of the guest having a key and, since the accused has the burden, it must be presumed that he had none.

case, "It was never discussed." [5] In *Rackley*, the accused brought clothing with him when he stayed at the house; in *Perez*, the accused arrived with luggage; in this case respondent had a few extra clothes in a bag, but no toothbrush. In *Rackley*, the accused did not stay at the house the night before the raid, but had stayed there several times during the preceding month; in *Perez*, the accused arrived from out-of-town and stayed at the house, apparently without sleeping, for approximately 2 hours and 15 minutes before leaving in his host's car and being arrested; in this case, petitioner stayed overnight the night before his arrest.

The facts in *Rackley* are if anything more favorable for the accused's position than those in *Perez* and in this case, especially when one considers the important factor of the ability to exclude. Only Rackley had a key. This meant he could come when the leasee was not there and gave him the *de facto* ability to exclude others when he was there alone. Yet *Perez* and this case held there was standing and *Rackley* held there was not. The outcomes undoubtedly were different because the courts did not consider the same factors.

### C. Contrary To *Rakas v. Illinois*, Some Lower Courts Are Using A "Bright Line" Test.

*Perez*, *McIntosh*, and *Echegoyen* also seem to ignore the holding of *Rakas* that a "bright line" is inappropriate. *Perez* said:

> The *Rakas* decision indicates that the Supreme Court would now deny standing to a "casual visitor" to a house that is searched if the visitor has never been to a room

[5] The Minnesota Supreme Court said that Louanne Bergstrom testified that respondent had the right to allow or refuse visitors entry. As noted in the petition, there is no support in the record for such a statement. *See* Petition at 7.



> searched, or was in the room only one minute before the search began. (Citations omitted.)
>
> In the case at bar, however, the evidence indicates that Quentero and Banados were not "casual visitors" within the meaning of *Rakas*.

700 F.2d at 1236. Thus, *Perez* took *Rakas*' two examples of casual visitors and turned them into a "bright line" rule.

*McIntosh* said:

> The question of standing gives us little pause. . . . McIntosh had been residing at this dwelling as the Shurns' guest for several days and had a legitimate expectation of privacy within the residence.

857 F.2d at 467. *Echegoyen* said:

> It is clear that defendant's mere presence at the place searched would not give him standing. *Rakas*, 439 U.S. at 142-143, 99 S.Ct. at 429-30. But, . . . Echegoyen was an invited overnight guest who had permission to be on the premises when the searches occurred.

799 F.2d at 1277.[6] Thus, *McIntosh* and *Echegoyen* established their own "bright line" test, namely that every overnight guest has "standing." [7]

[6] *Echegoyen* also based its decision on the fact that the accused "with his involvement in the cocaine processing operation, would have had an interest in the items seized." 799 F.2d at 1277. The equipment seized, however, was apparently neither owned nor controlled by Echegoyen, but was instead owned or controlled by someone who was associated with him in some way, if not as a co-conspirator, in the illegal cocaine business.

[7] This "bright line," in addition to being inconsistent with a legitimate expectation of privacy in many—if not most—cases, would be no more helpful than the "legitimately on the premises" "bright line" that was rejected in *Rakas*. There are numerous types of overnight guests ranging from someone from out of town who stays for several weeks or even months to a dinner or party guest who has too much to drink, passes out and is allowed to remain on the floor or the couch until morning.

### D. This Case Provides An Appropriate Factual Setting In Which To Articulate Relevant Factors.

Many of the factors listed *supra* at 6 could apply to this case. This provides an opportunity to articulate the relevant factors in a concrete setting. For example, this Court could articulate the scope of the right to exclude as a factor by comparing the facts of this case with the completely different facts in *Jones v. United States*, 362 U.S. 257 (1960), a case in which the guest had the right to exclude others and also had a legitimate expectation of privacy. *See Rakas v. Illinois*, 439 U.S. at 149.

During the week before the search in *Jones*, the owner or lessee of the premises was out of town. Jones had a key and could come and go at will. Once inside the apartment, he and only he could decide whether anyone would be admitted. His dominion was complete until such time as the owner might come back. *See Rakas v. Illinois*, 439 U.S. at 149.

In this case, respondent had no key to the duplex. He was never left alone there. When his hostess left, he left with her, and did not return until she returned. As for respondent having the owner's permission to refuse to admit anyone, "it was never discussed." Nor was there any need to discuss it since Ms. Bergstrom was there every minute that petitioner was present as a guest and was perfectly able and capable to decide whom to admit and whom to exclude. Ms. Bergstrom would have allowed respondent to have visitors "if I saw no reason not to." Saying that this was the extent of petitioner's authority is tantamount to saying he had no authority at all. And of course, permission to have visitors is of much less significance to privacy expectations than is the right to exclude.



## II. IF THIS COURT REACHES THE EXIGENT CIRCUMSTANCES ISSUE, IT CAN PROVIDE HELPFUL GUIDANCE TO POLICE OFFICERS IN THE FIELD.

The Minnesota Supreme Court also ruled that there were not exigent circumstances. *Payton v. New York*, 445 U.S. 573 (1980), and *Steagald v. United States*, 451 U.S. 204 (1981), respectively required a warrant to arrest a suspect in his own home and a search warrant to arrest a suspect in another's home, unless there was consent or exigent circumstances. However, since exigent circumstances was not raised in either *Payton* or *Steagald*, they did not consider its scope, "thereby leaving to the lower courts the initial application of the exigent circumstances exception." *Welsh v. Wisconsin*, 466 U.S. 740, 749 (1984).

*Welsh v. Wisconsin* considered the application of the exigent circumstances exception. However, the fact that the offense involved in that case (a *civil* drunk driving charge) was relatively minor was deemed dispositive so that there was no need to discuss other aspects of the exception. Thus, when *Welsh* referred to *Dorman v. United States*, 435 F.2d 385 (D.C. Cir. 1970), an often-cited lower court decision that has articulated seven different factors related to exigent circumstances, it said:

> Without approving all of the factors included in the standard adopted by that court [*Dorman*], it is sufficient to note that many other lower courts have also considered the gravity of the offense an important part of their constitutional analysis.

466 U.S. at 752.

Thus, the relative gravity of the offense was dispositive in *Welsh*. However, in most cases where the exigent-circumstances exception may apply to an arrest in the suspect's or another's house, the crime (as in this case) is very serious. In such cases, police officers cannot refer to *Welsh* to resolve any uncertainties about whether exigent circumstances exist.

If this Court should reach the exigent-circumstances issue, it will have the opportunity to expound clear, easily understood guidelines for officers. Such guidance is critically needed:

> The policeman on his beat must now make subtle discriminations that perplex even judges in their chambers. . . .
>
> Further, police officers will often face the difficult task of deciding whether the circumstances are sufficiently exigent to justify their entry to arrest without a warrant. This is a decision that must be made quickly in the most trying of circumstances.

*Payton v. New York*, 445 U.S. at 618-619, and at 619 (J. White dissenting). If there is a mistake in arresting, valuable evidence may be lost. If there is a failure to arrest, a dangerous criminal will be at large. *Id.* In providing this guidance, the Court will have the benefit not only of the concrete facts of this case, but also of the facts and analyses of many other lower court decisions since *Payton* and *Steagald*.

Propounding the precise scope of exigent circumstances appears to be more properly addressed in detail in a brief on the merits. However, the scope should be clear and easily understood by the officers on the street. For example, the numerous factors in *Dorman v. United States* are not particularly helpful to officers who must act with dispatch. *See* 2 W. LaFave, *Search and Seizure*, section 6.1(f) at 599-600 (2d ed. 1987).



## CONCLUSION

This Court should grant the petition of the State of Minnesota in order to decide the important issues presented.

Dated: June 23, 1989

Respectfully submitted,


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No. 88-1916

IN THE

# Supreme Court of the United States

October Term, 1988

STATE OF MINNESOTA,

*Petitioner,*

vs.

ROBERT DARREN OLSON,

*Respondent.*

ON WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

## JOINT APPENDIX

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PETITION FOR CERTIORARI DOCKETED MAY 26, 1989
CERTIORARI GRANTED OCTOBER 2, 1989

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# JOINT APPENDIX

## CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

August 11, 1987—Defendant indicted by Hennepin County Grand Jury on charges of first degree intentional murder, first degree felony murder, aggravated robbery and second degree assault.

December 7, 1987—Defendant arraigned and pled not guilty to all counts.

December 15-16, 1987—Pretrial evidentiary hearing held in Hennepin County District Court on defense motion to suppress evidence on Fourth Amendment grounds; Court requests written memoranda from counsel before ruling.

January 19, 1988—Defendant submits Memorandum of Law supporting Motion for Suppression of Evidence.

January 27, 1988—State submits Memorandum of Law opposing Defendant's Motion for Suppression of Evidence.

January 29, 1988—Hennepin County District Court issues Order and Memorandum denying Defendant's Motion to Suppress Evidence.

February 5, 1988—Jury trial begins in Hennepin County District Court.

February 11, 1988—Jury finds Defendant guilty of first degree felony murder, aggravated robbery and second degree assault.

February 11, 1988—Defendant sentenced to life imprisonment for murder and a concurrent nine year term for three counts of aggravated robbery.

February 19, 1988—Defendant files Motion for New Trial, alleging numerous trial errors, including the trial court's refusal to grant his motion to suppress evidence.

March 8, 1988—Hearing on Defendant's Motion for New Trial in Hennepin County District Court; Court denies Motion for New Trial.

March 29, 1988—Defendant files Notice of Appeal to Minnesota Supreme Court.

July 25, 1988—Defendant files Brief seeking review of his conviction, alleging numerous trial errors, including the trial court's refusal to grant Defendant's suppression motion.

October 4, 1988—State submits Brief opposing reversal of Defendant's conviction.

October 14, 1988—Defendant submits Reply Brief to Minnesota Supreme Court.

January 11, 1989—Case argued in the Minnesota Supreme Court.

February 24, 1989—Minnesota Supreme Court issues opinion reversing Defendant's convictions and remanding the case for a new trial.

March 6, 1989—State's Petition for Rehearing filed in Minnesota Supreme Court.

March 28, 1989—State's Petition for Rehearing summarily denied by Minnesota Supreme Court.

May 26, 1989—State's Petition for Writ of Certiorari docketed in the United States Supreme Court.

October 2, 1989—State's Petition for Writ of Certiorari granted.



State of Minnesota — District Court
County of Hennepin — Fourth Judicial District

File No. 94726-2

STATE OF MINNESOTA,

Plaintiff,

v.

ROBERT D. OLSON,

Defendant.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

The above-entitled matter came duly on for *Rasmussen* hearing before the undersigned Judge of District Court on December 15th and 16th, 1987.

Mr. Gary S. McGlennen, Assistant Hennepin County Attorney, appeared on behalf of the state.

Mr. Glenn P. Bruder, Esq., appeared on behalf of the defendant, who was also present.

The Court, having considered all files, records and proceedings herein, together with the memorandae and arguments of counsel, now makes the following:

FINDINGS OF FACT

1. That on July 18, 1987 a lone gunman entered the Amoco Station at 1000 University Avenue in Minneapolis.

2. That the gunman committed an armed robbery during the course of which the station manager, Roger Reinhart, was fatally shot.

3. That the gunman then fled the service station.

4. That Minneapolis Police Officers Scott Grabowski and Duane Pihl heard a police dispatcher report the robbery, shooting and suspect's appearance.

5. That Officer Pihl believed, because of a police report he had received, that this suspect might be one Joseph Ecker, who resided at 2420 Polk Avenue Northeast.

6. That the officers proceeded to that location where they observed a brown Oldsmobile proceeding northbound in the alley between 24th Street and Lowry Avenue.

7. That the officers exited their squad car and drew their weapons and began approaching the vehicle.

8. That the vehicle began backing rapidly away from the officers northbound down the alley towards Lowry Avenue.

9. That the officers re-entered their squad car and began to pursue the vehicle.

10. That the driver of the vehicle lost control of the vehicle as he turned onto Lowry Avenue and the car stopped.

11. That two individuals exited the vehicle and fled the area on foot.

12. That other Minneapolis Police Officers arrived on the scene and the house at 2420 Polk was searched; Joseph Ecker was taken into custody and subsequently identified as the gunman who had entered the Amoco Station.

13. That a search of the vehicle turned up a certificate of title on which Robert Olson's name appears, a letter address to Roger Olson, and a video movie rental receipt made out to Robert Olson and dated July 16, 1987.

14. That on Sunday, July 18, 1987, Sergeant James DeConcini was on duty in the Homicide Division of the Minneapolis Police Department.

15. That Sergeant DeConcini knew that there had been a robbery-homicide at the Southeast Amoco the day before; knew that the brown Oldsmobile had been linked to this robbery-homicide; knew that one occupant of the Oldsmobile, a caucasian male, was still at large; and knew that physical



evidence found in the Oldsmobile linked the vehicle to one Robert Olson.

16. That on Sunday morning, Sergeant DeConcini learned from Sergeant Robert Nelson that a "Diana Murphey" had called and stated that a "Rob" was the driver of the car involved in the robbery-homicide and that "Rob" was planning to leave town by bus soon.

17. That later that same day, a caller identifying herself once again as "Diana Murphey" telephoned Sergeant DeConcini and stated that "Rob" had told three people that he was the driver of the brown Oldsmobile used in the robbery-homicide and that two of the people he had told this to were "Julie" and "LouAnne" of 2406 Fillmore Northeast.

18. That Sergeant DeConcini sent Minneapolis Police Officers to 2406 Fillmore Northeast to verify this information.

19. That when the officers arrived at 2406 Fillmore they learned that the dwelling was a duplex and that Julie and LouAnne Bergstrom resided in the upper apartment.

20. That the officers talked to the resident of the lower apartment, Helen Niederhoffer, who told them that Rob Olson was staying upstairs but was not there at that time; Ms. Niederhoffer stated she would call the police when Robert Olson returned.

21. That Sergeant DeConcini issued a pick-up order for Robert Olson at approximately 2:00 p.m.

22. That at approximately 2:30 p.m. Helen Niederhoffer called Sergeant DeConcini and stated that Robert Olson had returned to the upstairs apartment at 2406 Fillmore.

23. That Sergeant DeConcini then dispatched officers to 2406 Fillmore.

24. That when the officers had taken up positions outside the residence, Sergeant DeConcini telephoned the residence

and spoke with Julie Bergstrom; Sergeant DeConcini told Julie Bergstrom that he wanted Robert Olson to go outside and Sergeant DeConcini heard a male voice say, "Tell them I left."; Julie Bergstrom then stated, "Rob left already."

25. That Sergeant DeConcini related this information to the officers stationed outside the residence.

26. That the officers then entered the residence at 2406 Fillmore and arrested Robert Olson.

27. That at the Rasmussen hearing Dianna Joe Humphrey testified that she resided at the address given by the caller to Sergeant DeConcini and that her phone number matched the number given by the caller to the sergeant, but that she never made any calls to anyone regarding Robert Olson.

28. That Robert Olson testified that he had stayed at 2406 Fillmore for one night, had no bed there and had slept on the floor, had no closet, dresser, toothbrush, and only one bag of clothes, and was reluctant to return to 2420 Polk, where he had been living previously, because he knew that the police had arrested Joseph Ecker there and had searched that premises.

CONCLUSIONS OF LAW

1. The warrantless arrest of the defendant at 2406 Fillmore Northeast was not violative of his Fourth Amendment rights.

2. Defendant had no reasonable expectation of privacy in the residence at 2406 Fillmore Northeast.

3. Probable cause existed to arrest the defendant without a warrant at 2406 Fillmore Northeast.

4. There being no violation of the defendant's Fourth Amendment rights, there are no grounds for excluding and suppressing any evidence derived, directly or indirectly, from the defendant's arrest at 2406 Fillmore.



ORDER

1. Defendant's motion to exclude and suppress any and all evidence, directly or indirectly derived from his arrest at 2406 Fillmore is hereby denied in all respects.

2. The attached memorandum is hereby incorporated by reference.

Dated: January 29, 1988.

By The Court:
JAMES H. JOHNSTON
Judge of District Court

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MEMORANDUM

THE WARRANTLESS ARREST OF THE DEFENDANT WAS NOT VIOLATIVE OF HIS FOURTH AMENDMENT RIGHTS. ANY AND ALL EVIDENCE DERIVED DIRECTLY OR INDIRECTLY FROM THIS ARREST WILL THEREFORE NOT BE EXCLUDED OR SUPPRESSED.

I. Defendant had no reasonable expectation of privacy in the dwelling located at 2406 Fillmore Northeast.

In order to successfully move to suppress evidence, the defendant must have had a reasonable expectation of privacy in the area searched. See, *State v. Brown*, 345 N.W.2d 233, 237 (Minn. 1984). If the defendant had no such expectation of privacy, then he lacks the requisite standing to challenge the constitutionality of the police conduct. If the defendant did in fact have a reasonable expectation of privacy, the Court will then inquire whether the defendant exhibited an actual expectation of privacy (see *United States v. Chadwick*, 433 U.S. 1 (1977) and whether his expectation is one that society recognizes as reasonable, (see *Smith v. Maryland*, 442 U.S. 735 (1979)).

In the present case, the Court finds that the defendant had no legitimate expectation of privacy in the dwelling at 2406 Fillmore and therefore lacks standing to challenge the evidence derived from his arrest at that location. Furthermore, the Court finds that, even if defendant did have a legitimate expectation of privacy at 2406 Fillmore for purposes of standing, the defendant did not exhibit any actual expectation of privacy in that dwelling and also that any expectation of privacy the defendant had was unreasonable.

The Court finds that the defendant had no legitimate expectation of privacy for the following reasons. Defendant's abode for a number of weeks before July 19, 1987 was 2420 Polk, not 2406 Fillmore. Defendant was reluctant to return to 2420 Polk because he knew that Joseph Ecker had been arrested there in connection with the robbery-homicide at the Southeast Amoco and also that the police had searched the dwelling on Polk. The defendant had been linked to this robbery-homicide by evidence found in the vehicle used to flee the scene and by tips from an informant. Defendant was not the owner of the property at 2406 Fillmore. He was not a tenant at the house. Defendant had spent only one night there when he was arrested. He had no dresser or closet and only one bag of clothes with him. He had no bed but instead slept on the floor. He did not have a toothbrush at 2406 Fillmore. Based on these facts, the Court finds that the defendant had no legitimate expectation of privacy in the dwelling at 2406 Fillmore and therefore lacks standing to challenge any and all evidence against him procured as a result of his arrest at that location.

Furthermore, the Court finds defendant's statement to Julie Bergstrom (telling her to tell the police that he had left the premises) shows that defendant did not exhibit any expectation of privacy in the dwelling at 2406 Fillmore. The Court



also finds that since the defendant had been connected with a robbery-homicide and was reluctant to return to his usual abode on Polk, the defendant was not an invited guest at 2406 Fillmore but rather a fugitive from a criminal investigation. The Court therefore finds that any expectation of privacy the defendant may have had was unreasonable.

In conclusion, the Court finds that the defendant had no legitimate expectation of privacy in the premises at 2406 Fillmore. Defendant therefore lacks standing to challenge the evidence procured against him as a result of his arrest at that location. Defendant did not exhibit any actual expectation of privacy in that dwelling and any expectation of privacy the defendant may have had, for purposes of argument, was unreasonable.

II. The police had probable cause to arrest the defendant at 2406 Fillmore without an arrest warrant.

Probable cause is defined as:

> A reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty.

*State v. Olson*, 342 N.W.2d 638, 640 (Minn.Ct.App.); *State v. Childs*, 269 N.W.2d 25, 27 (Minn. 1978). Where the police have arrested a suspect without a warrant the test is whether the officer in the particular circumstances, conditioned by his own observations and information, and guided by the whole of his police experience, reasonably could have believed that a crime had been committed by the person to be arrested. *State v. Merrill*, 274 N.W.2d 99 (Minn. 1980). Although the Fourth Amendment prohibits the police from making a warrantless entry into the suspect's home to make an arrest, absent consent or hot pursuit, the defendant in this case was not in his own home and, as has already been discussed, had no legiti-

mate expectation of privacy in the dwelling where he was arrested. The issue is whether Sergeant DeConcini had probable cause to order the arrest of the defendant at 2406 Fillmore on July 19, 1987. For the following reasons, the Court finds that probable cause did exist to arrest the defendant.

At the time of the defendant's arrest, Sergeant DeConcini knew that a robbery-homicide had occurred at the Southeast Amoco. He also knew that two pieces of physical evidence, a certificate of title and a movie rental receipt, had been found in the vehicle that had been linked to the robbery-homicide and that these pieces of evidence implicated the defendant. Sergeant DeConcini was also aware of two telephone calls from a "Diana Murphey" who stated that "Rob" had told "Julie" and "LouAnne" that he had driven this vehicle and that he was planning to leave town soon by bus. This "Diana Murphey" had also stated that "Julie" and "LouAnne" resided at 2406 Fillmore Northeast. Sergeant DeConcini sent Minneapolis police officers to verify the tip. The officers went to 2406 Fillmore Northeast and did verify that the upper portion of the duplex was occupied by Julie and LouAnne Bergstrom and that Robert Olson was in fact staying there.

At the Rasmussen hearing the defendant, through counsel, contended that because there is no such person as "Diana Murphey" the statements from this person can not form the basis for probable cause to arrest the defendant. (There is a Dianna Joe Humphrey living at the address given by the informant, but Ms. Humphrey denied making any calls to Sergeant DeConcini or anyone in the Minneapolis Police Department.) The Court can not agree with this argument.

As a dispositive matter, the Court finds that Sergeant DeConcini had probable cause to order the defendant's arrest even without the information provided by "Diana Murphey".



Sergeant DeConcini knew that a robbery-homicide had occurred at the Southeast Amoco Station one day earlier and that one suspect had been captured after a short car chase and that another male caucasian suspect was still at large. The sergeant knew that the vehicle which had been the subject of the brief chase, and which the two suspects had occupied, had been searched and that evidence had been discovered inside it linking the vehicle to the robbery-homicide and a Robert Olson to the vehicle. The Court finds that under these circumstances, Sergeant DeConcini, conditioned by his own observations and information, and guided by his police experience, could reasonably have believed that the defendant had been involved in the robbery-homicide at the Southeast Amoco Station of July 18, 1987, even without considering the information provided by "Diana Murphey".

The Court also finds that the information provided by "Diana Murphey" could properly be considered by Sergeant DeConcini for purposes of establishing probable cause even though the true identity of "Diana Murphey" was and remains unknown. The credibility of an (anonymous) informant's information may be established by sufficient corroboration of the details of the tip so that it is clear that the informant is telling the truth on this occasion. *State v. Causey*, 257 N.W.2d 288 (Minn. 1977). The Court finds that the police did sufficiently corroborate the information they received from "Diana Murphey".

The information that "Diana Murphey" gave to the police was that "Rob" was the driver of the getaway car and that he was planning to leave town soon on a bus. "Diana Murphey" also told Sergeant DeConcini that "Rob" had admitted his involvement in the robbery-homicide to three people, two of whom were "Julie" and "LouAnne", who lived at 2406 Fill-

more. The police went to 2406 Fillmore and verified that Julie and LouAnne Bergstrom did in fact live at that address. The police also confirmed that a Robert Olson was staying with Julie and LouAnne in their upper duplex apartment. Later that day before entering the residence to arrest the defendant, Sergeant DeConcini confirmed that there was a "Rob" in the premises at that time and that "Rob" wanted the police to believe that he had left the dwelling. Although the police did not confirm every aspect of "Diana Murphey's" tip, they did verify that two women named Julie and LouAnne lived at the address stated by "Diana Murphey", that a Robert Olson was staying with them, and that a "Rob" was in the dwelling when Sergeant DeConcini called the residence and that "Rob" did not want the police to know that he was still there when the sergeant telephoned.

The Court concludes, based on the foregoing facts, that it was reasonable for Sergeant DeConcini to believe the credibility of an anonymous informant under these circumstances. Given the aspects of the tip that were corroborated and verified by the police, it was reasonable for Sergeant DeConcini to believe that the remainder of the information in the tip was reliable as well. The Court finds that the details of "Diana Murphey's" information were sufficiently corroborated so that it was clear to Sergeant DeConcini that this anonymous informant was telling the truth.

In conclusion, the Court finds that there was probable cause to arrest the defendant without a warrant. There was sufficient evidence discovered in the suspected getaway vehicle to establish probable cause against the defendant. The information supplied by "Diana Murphey" was furthermore sufficiently corroborated by the police to justify Sergeant DeConcini's belief that the tip was true.



## CONCLUSION

The Court has found that the defendant had no legitimate expectation of privacy in the dwelling at 2406 Fillmore. Therefore the defendant lacks the requisite standing to challenge the legality of the evidence procured from his arrest on Fourth Amendment grounds. The Court has also found that probable cause existed under the facts and circumstances of this case to justify the warrantless arrest of the defendant. Defendant's motion to exclude and suppress the evidence obtained as a direct or indirect result of his arrest on July 19, 1987 must there be and is hereby denied.

J.H.J.

STATE OF MINNESOTA
IN SUPREME COURT

C3-88-687

Hennepin County — Simonett, J.
Took no part, Keith, J.

STATE OF MINNESOTA,

Respondent,

vs.

ROBERT DARREN OLSON,

Appellant.

Filed February 24, 1989
Office of Appellate Courts

SYLLABUS

Warrantless entry of defendant's dwelling, in absence of exigent circumstances, requires suppression of defendant's statement and, hence, a new trial.

Reversed and remanded for a new trial.

Heard, considered, and decided by the court en banc.

OPINION

SIMONETT, Justice.

Defendant Robert Olson appeals his conviction for first degree murder, three counts of armed robbery, and three counts of second degree assault. He claims, among other things, that his arrest was illegal, lacking probable cause and accomplished by a warrantless entry of the place where he was staying. We conclude Robert Olson's constitutional rights were violated by the warrantless entry requiring suppression of tainted evidence, and reverse for a new trial.



On Saturday morning, July 18, 1987, shortly before 6 a.m., a lone gunman robbed an Amoco station in Minneapolis, shooting to death the station manager. The police were quickly alerted and, from the description of the robbery, suspected Joseph Ecker. Two officers drove to Ecker's home, arriving at about the same time as a brown Oldsmobile pulled up. The Oldsmobile tried to escape, spun out of control, and came to a stop. Two white males got out of the car and fled on foot. In short order one of the two men, who proved to be Joseph Ecker and who was identified as the robber-gunman, was captured inside his home. The other man, unidentified but described as tall, thin, a white male in his early twenties with sandy brown hair, escaped. It was now about 6:15 a.m.

Inside the abandoned Oldsmobile police found a sack of money and the weapon soon thereafter identified as the murder weapon. Also in the car was a title certificate showing the Oldsmobile's owner to be Keith Jacobson. The name Rob Olson appeared on the certificate as a secured party but with the name crossed out; the bottom half of the certificate, used to transfer title, was missing. There was also a letter in the car, dated May 11, 1987, from an insurance company addressed to *Roger R.* Olson, 3151 Johnson Street. A second search of the car pursuant to a search warrant revealed a videotape rental receipt dated July 16, 1987 (2 days earlier), issued to Rob Olson. The police verified that a Robert Olson lived at 3151 Johnson Street. The police talked to Ecker and a woman who had been in the house when Ecker was arrested. Neither identified Robert Olson as having been in the getaway Oldsmobile or connected with the robbery. The woman gave the names of persons who had been with Ecker the night before; Olson's name was not among them. The police were unable to locate Keith Jacobson.

The next day was Sunday, July 19. In the morning a woman called the police and said a man by the name of Rob was the driver of the getaway car and was planning to leave town by bus. The caller gave her name as Dianna Murphy. About noon the woman called again, said she was Dianna Murphy, and gave her address and phone number. She said that a woman named Maria lived on Garfield Northeast and gave Maria's phone number. Maria, she said, had told her that a man named Rob had admitted to Maria and to two other women, Louanne and Julie, that he was the driver in the Amoco robbery. The caller said Louanne was Julie's mother and the two women lived at 2406 Fillmore Northeast.

The detective-in-charge who took the second telephone call did not attempt to verify the identity of the caller. If he had, he would have learned no one by the name of Dianna Murphy lived at the address and phone number given. Neither was Maria contacted. The detective did, however, send police officers to 2406 Fillmore to check out Louanne and Julie. The Fillmore address proved to be a duplex. Louanne Bergstrom and her daughter Julie resided in the upper unit but were not home. Louanne's mother (Julie's grandmother) lived in the lower unit. She confirmed that a Rob Olson had been staying upstairs and promised to call the police when Olson returned. The grandmother was not aware of Olson's involvement in any robbery. A pickup order was then issued for Olson's arrest.

About 2:45 p.m., the grandmother called police and said Olson had returned. The detective then instructed police officers to surround the house. No effort was made to obtain an arrest warrant. The detective later explained in court that he had never attempted to get an arrest warrant on a weekend during his 20 years on the force. After the house was surrounded, the detective phoned Julie and told her Rob should come out of the house. The detective heard a male voice say "tell them I left." Julie then said that Rob had left, whereupon the detective ordered the police to enter the house. They did so with drawn weapons and without seeking permission. Defendant Olson, age 19, was found hiding in a closet.



After his arrest, defendant admitted to the police that he had driven Joseph Ecker from Ecker's house to an apartment building on Second Avenue Southeast near the Amoco station on University Avenue. Olson said Ecker had asked for a ride to pick up a girlfriend; that on the way he stopped at the Amoco station to buy cigarettes and pop; and that he then parked by the apartment building about a block from the station. He said Ecker was gone about 10 minutes and returned with a gun and a bag and ordered Olson to drive him home. Olson said he fled from the police at the Ecker house because he was scared of Ecker. Subsequent investigation disclosed that Olson had bought the Oldsmobile from Keith Jacobson but title had not yet been transferred. Defendant's defense at trial was that he had been duped into driving Ecker to the scene of the robbery.

The two main issues on appeal concern the legality of defendant's arrest. Was there probable cause? Did circumstances justify a warrantless, nonconsensual entry of the duplex? Defendant argues both these questions must be answered no, and, therefore, evidence obtained from his arrest—most importantly, his statement to the police—should have been suppressed.

I.

When police have arrested a suspect without a warrant, the test is whether the officers in the particular circumstances, conditioned by their own observations and information and

guided by the whole of their police experience, reasonably could have believed that a crime had been committed by the person to be arrested. *State v. Merrill*, 274 N.W.2d 99, 108 (Minn. 1978). A determination of whether the police had probable cause to arrest is a determination of constitutional rights, and this court makes an independent review of the facts to determine the reasonableness of the police officer's actions. *See Ker v. California*, 374 U.S. 23, 34 (1963).

At the time of defendant's arrest the police knew that a robbery-homicide had occurred. They had arrested one suspect, Joseph Ecker, and had a description of the unknown driver. In the getaway car was a certificate of title listing Keith Jacobson as the car's owner. The name Rob Olson was on the title certificate but as a secured party and the name was crossed out. A receipt for a videotape rental, dated 2 days earlier, was also in the car, issued to Robert Olson.

The trial court found that this physical evidence alone, without the informant's tip, was sufficient to establish probable cause. We have our doubts. As defendant points out, this evidence only suggested Olson might have had some property or lien interest in the getaway car and that he may have ridden in the car 2 days before the robbery. Keith Jacobson would seem to have been a more likely suspect. Significantly, although the police had this physical evidence on Saturday, they did not issue a pick-up order for Olson until Sunday, after receiving the telephone tip from "Dianna Murphy."

Consequently, the question becomes whether the tip was reliable and if it together with the physical evidence establishes probable cause. In evaluating an informant's tip, the court looks at the commonsense totality of the circumstances, including the informant's veracity, reliability, and basis of knowledge. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). In this



case, the police knew nothing about the informant's identity or reliability. If the police had called the number "Dianna Murphy" gave them or checked her name in the telephone directory, they would have found there was no such person. The caller did not claim any personal knowledge of the information related, simply passing on what she had apparently been told by Maria, another unidentified source. On the other hand, the police did verify that at least part of the information given was correct, namely, that two women named Louanne and Julie lived at the address given and that a Rob Olson was staying there. The police also knew that the getaway car was connected in some way with a man named Rob Olson, which lent credence to the informant's statement that Rob Olson was the driver of the getaway car.

"[T]he fact that police can corroborate part of the informant's tip as truthful may suggest that the entire tip is reliable." *State v. Siegfried*, 274 N.W.2d 113, 115 (Minn. 1978). In *Siegfried*, however, the informant was known to the police as a reliable private citizen and had obtained the reported information by personal observation; further, the information had been accepted by a magistrate in granting an application for a search warrant. *See also State v. Wiley*, 366 N.W.2d 265 (Minn. 1985) (corroboration on a non-key item and informant had history of past reliability). The trial court here relied on *State v. Causey*, 257 N.W.2d 288 (Minn. 1977); but in *Causey* a magistrate had found probable cause for issuing a search warrant based on information supplied by a known reliable informant who accompanied the officer to the defendant's residence, where a car registered to a convicted drug possessor was parked. *Cf. State v. Eling*, 355 N.W.2d 286 (Minn. 1984) (police made extensive efforts verifying informant's identity and source of information). Nevertheless,

there is force to the state's argument in this case that "Dianna Murphy's" tip was sufficiently corroborated so that, together with other known information, there was probable cause.

A review of our cases reveals, what should come as no surprise, that the "totality of the circumstances" test is fact-specific. In this case we conclude we need not resolve the probable cause issue because the issue of warrantless entry, which we next discuss, proves to be dispositive.

II.

Defendant claims the warrantless entry of the duplex at 2406 Fillmore to seize him was a violation of his fourth amendment rights. The state counters that defendant lacks standing to make this challenge; but, even if standing exists, exigent circumstances justified the warrantless entry of the duplex. We conclude defendant's constitutional rights were violated.

It is unclear why an arrest warrant was not obtained in this case, particularly since we have encouraged law enforcement officers to obtain a warrant whenever possible. *See Merrill*, 274 N.W.2d at 108. The previous day, Saturday, the police had no difficulty in obtaining a search warrant for the car in 2½ hours. Here, however, apparently no attempt was made to obtain an arrest warrant because it was Sunday, surely a curious reason for not observing the constitutional safeguards of citizens.

A.

For defendant Olson to challenge the warrantless entry and seizure of his person at Louanne's house, he must show a legitimate expectation of privacy in the upper duplex at 2406 Fillmore. *See State v. Brown*, 345 N.W.2d 233, 237 (Minn. 1984). For some days prior to the robbery, Olson had been living with Ecker at 2420 Polk. On Friday night he did not



return to Ecker's house until 4:30 a.m., having been out on a date. On Saturday night Olson did not return to Ecker's house, nor to his own, because he was afraid of being arrested; instead he stayed that night at Louanne Bergstrom's duplex. The trial court found that Olson had no reasonable expectation of privacy in the 2406 Fillmore residence. The court said Olson was not a tenant; that he had no possessions at the duplex except for a change of clothes; and that he slept on the floor. This ruling ignores, however, the fact that Olson had permission to stay at 2406 Fillmore for some indefinite period, and that Louanne Bergstrom testified Olson had the right to allow or refuse visitors entry. While the United States Supreme Court has rejected the notion that anyone legitimately in a dwelling automatically has standing to challenge an illegal search, *Rakas v. Illinois*, 439 U.S. 128, 142 (1978), this does not mean that a guest never has standing. *See also United States v. Salvucci*, 488 U.S. 83 (1980) (overruling the holding in *Jones v. United States*, 362 U.S. 257 (1960) that possession of a seized good creates standing). Indeed, this case is quite similar to *Jones*, where an expectation of privacy was found. Jones had permission to stay at a friend's apartment; he had a key; he had a change of clothes; his home was elsewhere; and he had slept at the friend's apartment for "maybe a night." *Id.* at 259. Although the *Rakas* court subsequently qualified the rationale of *Jones*, it expressly reaffirmed the factual holding of that case. *Rakas*, 439 U.S. at 142-43. *See also Steagald v. United States*, 451 U.S. 204, 230-31 (1981) (Rehnquist, J., dissenting).

The trial court thought it significant that Olson was trying to evade the police so that his presence at 2406 Fillmore was "wrongful." Not so. A reasonable expectation of privacy is not forfeited (nor to be emasculated) because of the defen-

dant's motives for seeking privacy. As LaFave explains, "to deny standing merely because it turns out the defendant had a criminal purpose is in sharp conflict with the rationale underlying the exclusionary rule." 4 W. LaFave, *Search and Seizure* § 11.3(b) at 299 (2d ed. 1987).

Finally, the state argues that defendant had no *actual* expectation of privacy. In *Smith v. Maryland*, 442 U.S. 735, 740 (1979), the United States Supreme Court said that to challenge an illegal search a defendant must have an actual expectation of privacy as well as one that society is prepared to recognize as reasonable. The trial court thought that defendant's statement to Julie, "tell them I've left," indicated that defendant had no actual expectation of privacy at 2406 Fillmore. We think not. This statement more likely suggests that defendant was simply attempting to discourage the police from invading his privacy by giving them a further reason, albeit of doubtful plausibility, not to enter the house.

We hold that defendant has standing to challenge the legality of his arrest.

B.

The right to be secure in the place which is one's home, to be protected from warrantless, nonconsensual intrusion into the privacy of one's dwelling, is an important fourth amendment right. *See, e.g., Welsh v. Wisconsin*, 466 U.S. 740, 749 (1984); *State v. Storvick*, 428 N.W.2d 55, 61 (Minn. 1988). To justify a warrantless arrest in a defendant's home, the state must show urgent need, *i.e.*, the presence of exigent circumstances. We make our own evaluation of the found facts (which in this case are not in dispute) in concluding whether exigent circumstances exist. *Storvick*, 428 N.W.2d at 58 n. 1. In making this determination, we have used the so-called *Dorman* analysis, with the understanding that the *Dorman* factors are part of a flexible approach that encompasses all relevant



circumstances. *State v. Lohnes*, 344 N.W.2d 605, 611 (Minn. 1984).[1] Thus, a warrantless intrusion may be justified by hot pursuit of a fleeing felon, or imminent destruction of evidence, *Welsh*, 466 U.S. 740, or the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling. *Lohnes*, 344 N.W.2d 605; *State v. Hatcher*, 322 N.W.2d 210 (Minn. 1982).

In this case the state claims exigent circumstances for a warrantless arrest in Louanne's duplex because defendant was a suspect in a murder, guns had been found in the getaway car, defendant had fled the police once, and there was information that he might try to flee again.

While it is true a grave crime was involved, it is also true that the suspect was known not to be the murderer but thought to be the driver of the getaway car. Probable cause to believe the suspect was the driver depended, as we have seen, in large part on the reliability of the unknown informant. The police had already recovered the murder weapon. The suspect had not left town by bus, at least not yet, as the telephone tip had indicated, but had returned to the duplex where he had stayed the previous night. The police knew that Louanne and Julie were with the suspect in the upstairs duplex with no suggestion of danger to them. Three or four Minneapolis police squads surrounded the house. The time was 3 p.m., Sunday.

We do not think the particular circumstances of this case amount to exigent circumstances. It was evident the suspect

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[1] The *Dorman* analysis considers: (a) whether the offense is a grave offense, particularly a crime of violence; (b) whether the suspect is reasonably believed to be armed; (c) whether the showing of probable cause connecting the defendant to the offense is more than minimal; (d) whether the police have strong reason to believe that the suspect is in the premises being entered; and (e) whether there is a likelihood that the suspect will escape if not swiftly apprehended. *Dorman v. United States*, 435 F.2d 385, 392-93 (D.C. Cir. 1970).

was going nowhere. If he came out of the house he would have been promptly apprehended. This case is unlike *Lohnes*, for example, where the suspect was believed to have committed the crime of violence, probable cause was strong, and the weapon had not been found. In *Lohnes*, too, the dwelling was in an isolated rural area, distant from a magistrate, the time 5 a.m., and it was doubtful if sufficient police resources were on hand to contain the suspect until an arrest warrant could be obtained. *Lohnes*, 344 N.W.2d at 611-12.

Cases from other jurisdictions are split on whether surveillance or a stake-out should be used to gain time to obtain an arrest warrant. *See* 2 W. LaFave, *Search and Seizure* § 6.1(f), at 605-08 (2d ed. 1987). Again, the differing circumstances can explain the differing results. Sometimes a stake-out will adequately freeze the situation, while on other occasions the ensuing delay may increase the chances of escape or danger to others. LaFave suggests a distinction between an arrest which is planned in advance and an arrest in medias res, which occurs in the field as part of unfolding developments. *Id.* Thus, in *Lohnes*, we pointed out that the arrest was the culmination of a rapidly developing situation in the field, with only 35 minutes elapsing from the time the sheriff attempted to locate the suspect to the warrantless arrest of the suspect at his home. *Lohnes*, 344 N.W.2d at 611. *See also Welsh*, 466 U.S. at 761 (White, J., dissenting) ("The decision to arrest without a warrant typically is made in the field under less-than-optimal circumstances * * *."). Where, however, the arrest is planned in advance, it is less likely the police can claim exigent circumstances.

Shortly after 1 p.m. on Sunday the detective in charge talked with Julie's grandmother on the telephone and learned that a Rob Olson "had been staying upstairs for a day or two with Louanne and Julie," and he obtained the grandmother's promise to call if Rob returned to the house. At 2 p.m. the detective issued a pick-up order for Olson, what he called a "probable cause arrest bulletin." The police were instructed to stay away from the duplex. At 2:45 p.m. the grandmother called the detective again to report Rob had returned. Squad cars were sent to the duplex and, at 3 p.m., the detective (coordinating the arrest efforts from headquarters by radio and telephone) ordered entry of the duplex. Olson was brought to headquarters within an hour. By then the detective who had been in charge was gone. He went off duty at 3 p.m. At least by 2 p.m., then, the police had made plans for Olson's arrest at the dwelling where he was staying at such time as Olson might return. Nevertheless, in the hour that elapsed before any arrest could be made at the duplex, no effort was made to obtain an arrest warrant to enter the dwelling. We do not know if a warrant could have been obtained within that hour, or within a relatively short time thereafter; on the other hand, the state has not suggested the warrant could not have been obtained. We do know a search warrant was obtained on Saturday, the day before, in 2 1/2 hours when the urgency to search an already impounded car was much less.



A warrantless, nonconsensual intrusion of one's dwelling is not to be lightly regarded; indeed, such an entry is considered presumptively unreasonable, and the United States Supreme Court has stressed the state bears a "heavy burden" to establish exigent circumstances. *Welsh*, 466 U.S. at 749. In this particular case, considering all the circumstances, we do not think that burden has been met. We hold defendant's fourth amendment rights were violated.

C.

Defendant asks that all evidence obtained from the illegal arrest be suppressed. This includes Olson's statement, the statements of all persons present at 2406 Fillmore at the time

of his arrest, and Joseph Ecker's statement which was obtained after the police showed him Olson's statement. Evidence obtained as a result of an illegal arrest must be suppressed unless it is obtained by means sufficiently distinguishable from the illegal exploitation to be purged of the primary taint. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). Here Olson was taken immediately to police headquarters, and the police obtained a statement from him within an hour of his illegal arrest. We believe the statement was tainted and must be suppressed.

While the state has not argued that Olson's statement was untainted, it does argue that admission of Olson's statement at trial was harmless beyond a reasonable doubt. *See State v. Forcier*, 420 N.W.2d 884, 886-87 (Minn. 1988). There was other evidence, says the state, to establish that Olson was the driver of the getaway car, and Olson's statement had no significant impact on the guilty verdicts. At trial, however, the state relied heavily on various details in Olson's statement to point out discrepancies in his story; these discrepancies were then used to argue that Olson was lying about being duped by Ecker. For example, in his statement Olson said he was in the Amoco station about 10 minutes before the robbery to buy cigarettes and pop but the surveillance videotape showed no customer in the store at that time. In final argument, the prosecutor told the jury, "Now the proof of the pudding here, ladies and gentlemen, is in this statement"; and the prosecutor then went on, point by point, to show where Olson's statement did not appear to square with other facts. Olson's credibility was a key issue at trial and use of his statement obtained as a result of the illegal arrest was not harmless error.

We reverse and remand for a new trial. As we have mentioned, defendant claims there is other evidence which should also be suppressed along with his statement. He supports his



claim only by assertion, and the record before us is unenlightening. The trial court on remand will be in a better position to deal with these claims. We need not reach other issues raised by defendant in this appeal.

Reversed and remanded for a new trial.

KEITH, Justice, took no part in the consideration or decision of this case.

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STATE OF MINNESOTA
IN SUPREME COURT

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C3-88-687

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STATE OF MINNESOTA,

Respondent,

vs.

ROBERT DARREN OLSON,

Appellant.

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ORDER

This court, having considered en banc the petition for rehearing in the above entitled cause,

IT IS ORDERED that the petition for rehearing be and hereby is denied and stay vacated.

Dated: March 28, 1989

By the Court:

JOHN E. SIMONETT
Associate Justice

KEITH, Justice, took no part in the consideration or decision of this case.

(6)



No. 88-1916

IN THE

# Supreme Court of the United States

October Term, 1989

STATE OF MINNESOTA,

*Petitioner,*

vs.

ROBERT DARREN OLSON,

*Respondent.*

ON WRIT OF CERTIORARI TO THE
MINNESOTA SUPREME COURT

## BRIEF FOR PETITIONER

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## QUESTIONS PRESENTED

1. After successfully eluding the police following an armed robbery and murder, defendant sleeps overnight on the floor at a friend's home. He has no key to the home, is never left alone there and has no possessions other than a few extra clothes in a bag. Does defendant have a legitimate expectation of privacy in the friend's home to enable him to challenge his warrantless arrest there under the Fourth and Fourteenth Amendments to the United States Constitution?

2. At 2:00 p.m. on a Sunday the police establish probable cause to believe defendant is an accomplice in an aggravated robbery and murder that occurred the day before. Police also have reason to believe that defendant is temporarily staying in a particular duplex; that he may be armed; and that he may be preparing to flee. Approximately an hour later, when police learn that defendant and his friends are present at that address, they surround the duplex. They telephone into the duplex and confirm defendant's presence and his refusal to come out. Under these circumstances, must police continue to stake out the building while obtaining a warrant, or is an immediate warrantless entry to arrest justified by exigent circumstances under the Fourth and Fourteenth Amendments to the United States Constitution?

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MINNESOTA SUPREME COURT

## BRIEF FOR PETITIONER

## OPINIONS BELOW

The opinion of the Minnesota Supreme Court (J.A.14-27) is reported at 436 N.W.2d 92 (Minn. 1989). The opinion of the Hennepin County District Court (J.A.3-13) is unreported.

## JURISDICTION

The judgment of the Minnesota Supreme Court was entered on February 24, 1989. The State filed a timely Petition for Rehearing on March 6, 1989. The Minnesota Supreme Court's summary denial of that Petition for Rehearing (J.A.27) was filed on March 28, 1989. The petition for a writ of certiorari was filed within sixty days of the court's denial of rehearing, and was granted on October 2, 1989.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a) (1989).

## CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution:

. . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ."

## STATEMENT OF THE CASE

On Saturday morning, July 18, 1987 a lone gunman entered a gas station in Minneapolis with an automatic weapon. Without a word, the man shot the young manager of the store in the back of the head. Then he robbed the other three employees of the station at gunpoint. Police were quickly alerted. Because the description of the robber fit Joseph Ecker, a man suspected of committing several robberies in the area, police officers went to Ecker's home within minutes of the robbery/murder. A brown Oldsmobile pulled up at Ecker's home at the same time as the police car. When the driver saw the squad car, he put his car in reverse and sped backwards; the car spun out of control and came to a stop. The driver and one other male jumped out of the car and fled on foot. Officers gave chase and quickly arrested Joseph Ecker, the passenger of the car, inside his home. The other man escaped. Ecker was later identified as the gunman who entered the station to commit the crime.



Inside the abandoned Oldsmobile police found the stolen money and the murder weapon, as well as various documents linking Respondent Robert Darren Olson to the car. They also found in the car a pellet gun in the shape of a revolver, a knife, a knife sheath and two empty shoulder holsters for handguns (R.85, 99; T.224, 341, 345, 369-70).[1]

Police continued to investigate. On the morning of the next day, Sunday, police received a tip that a man named "Rob" was the driver of the getaway car and was planning to leave town by bus (R.110-12, 129). Police officers were dispatched to the bus depot (R.129-130). At noon the tipster called again. She identified herself[2] to Sgt. DeConcini, the investigating officer, and told him that "Maria," who lived on Garfield Avenue N.E., had told her that "Rob" had admitted to her (Maria) and to "Louann and Julie" at 2406 Fillmore Avenue N.E. that he was the driver for the gas station robbery and murder (R.113-14, 122). Police officers went to 2406 Fillmore, a duplex, to try to verify the tip (R.114, 132, 148-50). They were unable to find Louann or Julie, but the person living in the lower portion of the duplex identified herself as Louann's mother and verified that Louann and Julie Bergstrom lived upstairs. She told police that Respondent had been staying with Louann and Julie for a day or so, but that they were not home now. She agreed to call police when they returned (R.114-15, 132-33, 142-44, 147, 148-50).

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[1] "R" refers to the transcript of the pretrial suppression hearing. This hearing is referred to as a "Rasmussen" hearing because it is mandated in Minnesota by *State ex rel. Rasmussen v. Tahash*, 272 Minn. 539, 141 N.W.2d 3 (1965). "T" refers to the trial transcript.

[2] The actual identity of the informant is unknown. The woman identified herself as "Diana Murphy" and gave an address and telephone number (R.113). A woman named Diana Humphrey, whose address and telephone number matched that given by the tipster, testified that she knew Louann and Julie but that she did not call the police (R.168-176).

At 2:00 p.m., shortly after he received this information, Sgt. DeConcini issued a "pickup order" for Respondent (R.115-117, 131; T.430). He did not attempt to get an arrest warrant (R.129).[3] He instructed his officers to stay away from the duplex until he received a call that Respondent had returned. At approximately 2:45 p.m. the downstairs resident called and told DeConcini that Respondent and the others had returned (R.117-18). DeConcini ordered his officers to surround the home. After they arrived, but before they tried to enter, DeConcini called the home. A woman who identified herself as "Julie" answered the telephone. DeConcini told her to tell Respondent to come out of the house, that police were waiting for him. There was a pause, and then DeConcini heard a male voice in the background saying, "tell them I left." Julie then came back on the phone and said "[Respondent] has left already" (R.118, 124; T.431, 433-34). DeConcini then directed the officers to enter the house.[4] They found

[3] Rules 2 and 3 of the Minnesota Rules of Criminal Procedure provide that an arrest warrant must be combined with a criminal complaint, which requires a county attorney's signature as well as judicial approval. 49 Minn.Stat.Ann.R.Cr.P. 2, 3. Sgt. DeConcini testified he did not attempt to obtain a warrant because it was Sunday, the county attorney's office was not open, and the tip gave him reason to believe that Respondent intended to flee (R.116, 129). He stated he did not know how long it would take to obtain an arrest warrant/complaint on Sunday in Hennepin County because he had never tried to obtain one on a weekend (R.130).

[4] There is no dispute that Louann Bergstrom opened the door in response to the officers' knock, and the police entered with guns drawn (R.184-85). In his Brief in Opposition to Petition for Certiorari Respondent characterized the police entry as a "storming of a dwelling" and quoted portions of Julie Bergstrom's testimony at the pretrial hearing in which she claimed to have been mistreated by police. Her testimony, however, was not supported by that of her mother, Julie's boyfriend or the police officers, and the trial court did not make such a finding of excessive force or mistreatment (*See* R.137-38, 145-46, 182-192, 208-211 and J.A.3-6).



Respondent hiding behind furniture and toys in the back of a small closet on the third floor attic of the building (R.118, 139-41; T.408-411). He was then arrested, and shortly after 3:00 p.m. police obtained a statement from him, in which he admitted driving Ecker to and from the crime scene but denied any involvement in the crime (R.157-163; T.379-396).[5]

In August 1987 Respondent and Joseph Ecker were indicted by a Hennepin County, Minnesota grand jury on charges of first degree premeditated murder, first degree felony murder, aggravated robbery and second degree assault.[6]

At a pretrial hearing Respondent moved to suppress his post arrest statement on the grounds that his warrantless arrest violated the Fourth and Fourteenth Amendments of the United States Constitution. Respondent argued that he had a legitimate expectation of privacy in the Bergstrom duplex and therefore the warrantless police entry to arrest him violated

[5] Subsequent police investigation revealed that the car used in the crime belonged to Respondent and that the murder weapon probably also belonged to Respondent (T.390, 475-500, 507-08).

[6] Minnesota Statutes §609.185 (1987) provided in relevant part:

> Whoever does any of the following is guilty of murder in the first degree and shall be sentenced to imprisonment for life:
>
> (1) causes the death of a human being with premeditation and with intent to effect the death of the person or of another;
>
> • • •
>
> (3) causes the death of a human being with intent to effect the death of the person or another, while committing or attempting to commit . . . aggravated robbery, . . . .

Minnesota Statutes §609.245 (1987) provided as follows:

> Whoever, while committing a robbery, is armed with a dangerous weapon or inflicts bodily harm upon another is guilty of aggravated robbery and may be sentenced to imprisonment for not more than 20 years or to payment of a fine of not more than $35,000 or both.

Minnesota Statutes §609.222 (1987) provides as follows:

> Whoever assaults another with a dangerous weapon may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both.

the principles set forth in *Payton v. New York*, 445 U.S. 573 (1980).[7] The State argued in response that Respondent lacked the necessary "standing" to contest the legality of his arrest and that in any event exigent circumstances justified the warrantless arrest.

Testimony presented at the hearing revealed the following facts with respect to Respondent's connection with the duplex: Respondent had been staying with Ecker at Ecker's home for at least ten days before the crime; after Respondent's narrow escape from police which resulted in Ecker's arrest in his home, Respondent did not wish to return there (R.220-21). Although they had not known him long, Julie Bergstrom and her mother, Louann, agreed to allow Respondent to stay with them for a day or two in their upper duplex (R.182, 184, 194-95, 198, 216). At the time of his arrest Respondent had slept on the floor for one night; also sharing the home that night was Julie's boyfriend (R.182, 189, 191, 208-09). Respondent had no legal interest in the duplex, did not receive mail there and did not have a key (R.220). Although he kept a few extra clothes in a bag at the home, he had no closet, dresser, or even a toothbrush, at the duplex (R.220). Julie Bergstrom testified that Respondent was free to come and go; however, during his overnight stay Respondent left the duplex when the other occupants left and returned only when the other occupants returned (R.183-84, 195, 216-17). The only evidence concerning

[7] Respondent also claimed that to the extent the police relied on information from a "fictitious informant," they lacked sufficient probable cause to arrest under the Fourth and Fourteenth Amendments to the United States Constitution. The trial court found that the information provided by the informant was sufficiently corroborated to justify police reliance, and that the tip, as well as the other incriminating evidence found in the getaway car, provided sufficient probable cause for Respondent's arrest (J.A.6, 9-12). On appeal the Minnesota Supreme Court discussed, but did not reach, the issue of probable cause to arrest (J.A.17-20).



Respondent's right to allow or refuse entry to visitors was as follows:

> Q. [by defense attorney]: And if somebody came over to see Mr. Olson, did he have your permission to admit them or refuse to admit them?
>
> A. [by Louann Bergstrom]: I don't know. It was never discussed.
>
> Q. Had somebody come over to visit Mr. Olson, would you have allowed him to decide if that person would visit with him?
>
> A. If I saw no reason not to.

(R.192). Although Respondent testified he would have given friends who wished to reach him the Bergstroms' address and phone number, there was no evidence that Respondent in fact did so or received any visitors during his brief stay at the Bergstroms (R.218, 225-26).

The trial court denied Respondent's motion to suppress, finding that under these facts, Respondent had no reasonable expectation of privacy in the duplex and thus had no "standing" to contest his arrest. The court did not therefore reach the issue of whether exigent circumstances justified the warrantless arrest (J.A.6-9).

On February 11, 1988, after a jury trial, Respondent was convicted as Ecker's accomplice of first degree felony murder, aggravated robbery and second degree assault. Respondent appealed his conviction to the Minnesota Supreme Court, alleging numerous errors, including the legality of his warrantless arrest. On February 24, 1989, the Minnesota Supreme Court, reaching only the issues of the legality of Respondent's warrantless arrest and his "standing" to raise the issue, reversed Respondent's conviction and remanded the case for a

new trial (J.A.14-27). The court held that as an overnight guest with permission to stay for an indefinite period and some authority to allow or refuse visitors entry, Respondent had a legitimate expectation of privacy in the duplex (J.A.20-22).[8]

The Minnesota Supreme Court then decided that the warrantless arrest was not justified by exigent circumstances because: a) Respondent was not the murderer but rather his accomplice; b) the police had no reason to believe Respondent was armed since they had already recovered the murder weapon; c) Respondent had not yet left town; and d) the police should have obtained a warrant, either during the hour while they waited for Respondent's return to the duplex or while they had the house surrounded (J.A.22-25). Because the court held that the arrest violated Respondent's federal Fourth Amendment rights, it suppressed Respondent's post arrest statement. The court found that the use of the statement at trial was not harmless error and remanded the case for a new trial (J.A.25-27). The State filed a timely Petition for Rehearing on March 6, 1989, which was summarily denied by the Minnesota Supreme Court on March 28, 1989 (J.A.27). Certiorari was granted by this Court on October 2, 1989.

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[8] Respondent has consistently argued that he had the authority to admit or refuse others entry; the State has consistently argued that the record does not support such a conclusion. The trial court did not explicitly find lack of authority to control, but such a finding is implicit in the trial court's order. The Minnesota Supreme Court implicitly held that the trial court's finding on this issue was clearly erroneous.



## SUMMARY OF ARGUMENT

### A. Legitimate Expectation of Privacy

It is well-settled that one cannot assert the Fourth Amendment privacy rights of another. *Alderman v. United States*, 394 U.S. 165 (1969). Respondent, therefore, as the proponent of a motion to suppress, has the burden of establishing not only that his arrest was illegal but also that he had a legitimate expectation of privacy in the home in which he was arrested. *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980).

The Minnesota Supreme Court held that Respondent, who was arrested after sleeping overnight in the home of an acquaintance, had a legitimate expectation of privacy in that home. The court came to that conclusion despite the existence of the following facts: 1) up until the night before his arrest Respondent had been living with his codefendant; 2) Respondent did not own or rent the home in which he was arrested and had no key; 3) Respondent kept no possessions there other than a change of clothes—not even a toothbrush; and 4) Respondent was never left alone there and had no clear authority to admit or refuse visitors. Because any right to privacy that Respondent could possess in the home could be derived only from his sleeping on the floor there one night with permission of the owners, the Minnesota Supreme Court's implicit holding is that Respondent's status as an overnight guest is alone sufficient to demonstrate a privacy interest in a third person's home. That holding conflicts with *Jones v. United States*, 362 U.S. 257 (1960), as interpreted by *Rakas v. Illinois*, 439 U.S. 128 (1978). *Jones* held that anyone "legitimately on the premises" where a search occurs has "standing" to challenge the legality of the search. In *Rakas* the Court rejected that language in *Jones*, but reaffirmed the *Jones* result, emphasizing

that the defendant in *Jones* had a privacy interest in his friend's apartment because, in addition to his legitimate presence, he had complete control over it and could exclude others from it. Since Respondent had no control and no right to exclude in his friend's home, the Minnesota Supreme Court's holding that he nevertheless had a privacy interest there is merely a restatement of the "legitimately on the premises" standard which this Court rejected in *Rakas*.

Moreover, any subjective privacy expectations held by Respondent under the facts of this case were not reasonable. This case raises the question of what facts must be present before society can reasonably find privacy expectations in a second place similar to those in one's own home. The State suggests twelve factors which reflect society's understanding of what makes a dwelling, even a temporary one, a "home." These factors reflect society's view that merely sleeping overnight in a place does not create privacy expectations: one must establish ownership or a relationship to the owner; extensive use; or some evidence of control over the premises before a reasonable expectation of privacy will be found.

The practical effect of the Minnesota court's holding is to greatly enlarge the class of persons who may invoke the exclusionary rule. There is, however, a substantial social cost to the invocation of the rule. By allowing felons to use the Fourth Amendment as a shield to escape apprehension wherever they flee, the Minnesota court's holding drastically shifts the vital and delicate balance between privacy rights and effective law enforcement.



**B. Exigent Circumstances**

Warrantless searches and seizures within the home are unreasonable under the Fourth Amendment unless exigent circumstances create a compelling need for official action and no time to secure a warrant. *Payton v. New York*, 445 U.S. 573 (1980); *Michigan v. Tyler*, 436 U.S. 499 (1978). The State contends that where, as in this case, police have probable cause to believe a suspect committed a felony and that the suspect will be located in a particular home, they can arrest the suspect there without a warrant if a delay to get a warrant will gravely endanger police officers or others and will result in the escape of the suspect. If arrest were delayed, a violent felon could destroy evidence, go into hiding, commit more crimes, or harm police officers or others. Delay may well allow the felon to contemplate and prepare an armed confrontation with police or the taking of a hostage. The Fourth Amendment does not require police officers to delay if to do so would gravely endanger their lives or the lives of others. *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967).

The police officer's decision to make a warrantless arrest was reasonable in this case because: 1) police had probable cause to believe that Respondent had participated in a violent felony which involved a firearm; 2) police believed Respondent might be armed; 3) Respondent was in hiding and police had received a tip that he was preparing to flee; 4) police had probable cause to believe Respondent was in the duplex; and 5) an arrest warrant/complaint required locating a county attorney, a secretary, and a judge on a Sunday afternoon, a process which could not have been accomplished quickly, and certainly not before Respondent returned to the duplex.

In addition, application of the exigent circumstances test described in *Dorman v. United States*, 435 F.2d 385, 392-93

(D.C. Cir. 1970) compels a finding of exigent circumstances in this case. Because the *Dorman* rule, however, is difficult for police officers to apply in the field, it should be rejected by this Court in favor of a simpler rule. The *Dorman* rule can be distilled to its essentials: an exigency exists when police have probable cause, knowledge of the suspect's whereabouts, and facts indicating that the suspect is dangerous and about to flee. This distillation, involving judgments that police officers are forced to make daily, can be more quickly and consistently applied by police officers than the original rule.

The exigency justifying Respondent's warrantless arrest was not destroyed by the officers' presumed ability to stake out the duplex while obtaining a warrant. The Minnesota court's holding to the contrary ignores the fact that to maintain surveillance of the "hideout" of a violent felon is extremely dangerous to the police, to the defendant, to the other occupants of the house, and to the public at large. Furthermore, stakeouts are not always effective in preventing escape. The Minnesota court's conclusion that a stakeout was required in this case because Respondent's arrest was "planned" is erroneous. Far from truly "planned," Respondent's arrest was the culmination of an ongoing, continuous field investigation. When police obtained both probable cause and knowledge of Respondent's possible location, they acted immediately to arrest because they believed they were faced with an emergency situation. Moreover, even if exigent circumstances did not exist before police went to the duplex to arrest Respondent, an exigency arose after they arrived, when a telephone call into the duplex suggested that Respondent intended to flee at that moment. *See Cardwell v. Lewis*, 417 U.S. 583, 595-96 (1974) (An exigency requiring police action may arise at any time after probable cause is established.).



## ARGUMENT

### I. RESPONDENT HAD NO LEGITIMATE EXPECTATION OF PRIVACY IN THE HOME IN WHICH HE WAS ARRESTED AND THEREFORE CANNOT SEEK TO SUPPRESS EVIDENCE OBTAINED AS A RESULT OF HIS WARRANTLESS ARREST.

This case presents the question of under what circumstances an overnight guest in a third person's home has a legitimate expectation of privacy in that home under the Fourth Amendment. The Minnesota Supreme Court held, in essence, that an overnight visitor staying for an indefinite period with permission of the owners has a legitimate privacy interest in that home. The practical effect of the Minnesota court's holding is to greatly enlarge the class of persons who may invoke the exclusionary rule, drastically shifting the delicate balance between privacy rights and effective law enforcement that this Court has attempted to strike over the years. Moreover, the court's holding contradicts the common sense understanding of "home" that citizens and police officers alike share.

Felons sought by the police frequently do not return to their homes, but stay briefly with a succession of friends or acquaintances to elude police. Under the Minnesota court's holding in this case, wherever a felon hides out overnight, however briefly, is his "home" for Fourth Amendment purposes, as long as he has permission to be there. But the Fourth Amendment was not designed to provide sanctuary for citizens wherever they are; it was intended to protect privacy in one's home. Merely sleeping in a place for one night does not make it one's home. *See* pp. 19-22, *infra*. That Respondent was arrested in someone's home is less important, for the purposes of the

Fourth Amendment, than the extent of Respondent's actual privacy interests in that place. *See Katz v. United States*, 389 U.S. 347, 351 (1967) ("The Fourth Amendment protects people, not places."). Under the facts of this case, it was no more an invasion of *Respondent's* privacy rights to arrest him in the Bergstroms' home than it would have been to arrest him at a park bench or in an office building where he had slept the night. If the police violated anyone's privacy rights by entering the Bergstroms' home, they violated the Bergstroms' rights. To broaden Fourth Amendment protection to persons like Respondent who have such a tenuous connection to a place is to virtually eliminate the "standing" requirement.

### A. Respondent Can Invoke the Exclusionary Rule Only If He Establishes that the Warrantless Entry Into the Duplex to Arrest Him Violated His Own Privacy Interests.

The essential purpose of the Fourth Amendment is to shield the citizen from unwarranted intrusions into his privacy. Freedom from intrusion into the home is the archetype of the privacy protection secured by the Fourth Amendment. *Payton v. New York*, 445 U.S. 573, 587, 588 n.26, 590 (1980). The principal method developed by the Court to protect Fourth Amendment rights is the exclusionary rule. The rule deters future arbitrary government intrusions of privacy by preventing the government from using the fruits of its illegal conduct against the person whose rights it violated.

The exclusionary rule, however, while protecting Fourth Amendment rights, also has a counterbalancing social cost: when it is applied, "relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected." *Rakas v. Illinois*, 439 U.S. 128, 137 (1978). This results in some guilty persons going free, causing public outrage and



distrust of the criminal justice system. Because of this substantial social cost, there must be limits on the invocation of the rule; the individual's constitutionally protected interest in privacy must be balanced with the public interest in effective law enforcement. *O'Connor v. Ortega*, 480 U.S. 709, 719-20 (1987). One way of striking this balance is the well-settled principle that one cannot assert the Fourth Amendment privacy rights of another. As the court explained in *Alderman v. United States*, 394 U.S. 165, 174-75 (1969):

> There is no necessity to exclude evidence against one defendant in order to protect the rights of another. No rights of the victim of an illegal search are at stake when the evidence is offered against some other party. The victim can and very probably will object for himself when and if it becomes important for him to do so . . . The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed . . . But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.

The proponent of a motion to suppress, therefore, has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure. *Rawlings v. Kentucky*, 448 U.S. 98, 104-05 (1980); *Rakas v. Illinois*, 439 U.S. 128, 130-31, n.1 (1978). Respondent must demonstrate not only that the arrest was illegal but also that he had a "legitimate expectation of privacy" in the upper duplex in

which he was arrested. *United States v. Salvucci*, 448 U.S. 83, 92 (1980); *Rawlings v. Kentucky*, 448 U.S. at 104.[9]

### B. Respondent Did not Overcome his Burden of Demonstrating a Legitimate Expectation of Privacy in the Duplex in Which He was Arrested.

#### 1. Respondent has no legitimate expectation of privacy under prior decisions of this court.

The record establishes that Respondent did not own or rent the duplex. He was not related to its owners. He did not possess a key. He did not receive mail or visitors there. He had never used the premises before. He kept no possessions there other than a change of clothes. He was never left alone in the duplex. His authority to admit or refuse visitors was never discussed or tested. Any right to privacy that Respondent could possess in the duplex could be derived only from his sleeping on the floor there one night with permission of the owners. Although some lower courts hold, at least implicitly, that a defendant's status as an overnight guest is alone sufficient to demonstrate a privacy interest in a third person's home,[10] prior decisions by this Court compel a different result.

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[9] Whether or not the police conduct in this case was outrageous pertains to the issue of the legality of the arrest and not to the "standing" issue. *See Rawlings v. Kentucky*, 448 U.S. at 112 (Blackmun, J., concurring). ("It remains possible for a defendant to prove that his legitimate interest of privacy was invaded, and yet fail to prove that the police acted illegally in doing so. And it is equally possible for a defendant to prove that the police acted illegally, and yet fail to prove that his own privacy interest was affected.").

[10] *See United States v. McIntosh*, 857 F.2d 466 (8th Cir. 1988); *United States v. Echegoyen*, 799 F.2d 1271 (9th Cir. 1986); *United States v. Underwood*, 717 F.2d 482 (9th Cir. 1983), *cert. denied*, 465 U.S. 1036 (1984). *See also State v. Elderts*, 62 Hawaii 495, 617 P.2d 89 (1980) (Since defendant was given permission by tenant to enter apartment, defendant had reasonable expectation of privacy there.).



In *Jones v. United States*, 362 U.S. 257 (1960) this Court held that anyone legitimately on the premises where a search occurs has "standing" to challenge the legality of the search. This Court significantly narrowed the *Jones* holding, however, in *Rakas v. Illinois*, 439 U.S. 128 (1978):

> We think that *Jones* on its facts merely stands for the unremarkable proposition that a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place.

439 U.S. at 142. The Court held that the correct inquiry was whether the challenger has a legitimate expectation of privacy in the area invaded. The Court nevertheless affirmed the *Jones* result, holding that Jones did have a legitimate expectation of privacy in the apartment searched. Crucial to that decision was the fact that the owner of the apartment was away and that Jones had a key to the apartment. He could therefore come and go at will, and freely admit and exclude others: "Jones had complete dominion and control over the apartment and could exclude others from it." *Rakas*, 439 U.S. at 149.[11]

In holding that Respondent had a legitimate expectation of privacy in the duplex, the Minnesota Supreme Court relied on *Jones*, stating that "this case is quite similar to *Jones*"

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[11] *See also Rawlings v. Kentucky*, 448 U.S. at 112 (Blackmun, J., concurring) ("In my view, the 'right to exclude' often may be a principal determinant in the establishment of a legitimate Fourth Amendment interest.").

(J.A.21). At first glance this case and *Jones* seem factually similar: Respondent and Jones were both overnight guests who carried with them only a change of clothes. There are, however, important factual differences between this case and *Jones* which the Minnesota Supreme Court overlooked. These factual differences demonstrate that Respondent had far less control over his friend's home than did Jones:

a) Respondent was never left alone in the duplex. The record indicates that he left the duplex when the other occupants of the dwelling left. He returned only when they returned.

b) Respondent presented no evidence that he had the right to refuse entry to others, and the evidence with respect to admitting entry to others was qualified and vague (*See* R.192).[12]

c) Respondent presented no evidence that he had a key to the duplex, a fact which is extremely important, although not determinative. When a host gives his guest a key to his house, he says, in effect, "my home is your home": the guest can then come and go at will, exclude others, and completely control the premises, at least as long as the owner is absent. Because Respondent's connection with, and control of, the premises was minimal, a careful application of *Rakas* compels a finding that Respondent lacked a reasonable expectation of privacy in the duplex. The Minnesota court's holding to the contrary is

[12] The State contends that the Minnesota Supreme Court's conclusion regarding Respondent's right to admit or exclude others is clearly erroneous because it was not supported by the record. Furthermore, even if the record were subject to conflicting interpretations, it is the State's position that Respondent did not overcome his burden of proof on this issue. Concerning the Defendant's burden of proof, *see Rawlings v. Kentucky*, 448 U.S. at 104; *Rakas v. Illinois*, 439 U.S. at 130-131, n.1.



merely a restatement of the "legitimately on the premises" standard which this Court rejected in *Rakas*.[13]

**2. An analysis of the totality of the circumstances, including Respondent's lack of ownership, and his lack of extensive control of the premises, demonstrates that Respondent had no reasonable expectation of privacy in the duplex.**

The Fourth Amendment is designed to protect people's privacy rights in their possessions and their homes. Yet one can have a legally sufficient interest in a place other than one's own home so that the Fourth Amendment protects his privacy there. *Rakas v. Illinois*, 439 U.S. at 142. When an individual

[13] Respondent must show that he had a legitimate expectation of privacy in the area searched. This Court has not indicated, however, whether, in an arrest situation, the "area searched" is the entire premises or is limited to the immediate area in which the person was arrested. In the context of search and seizure of property, however, this Court has indicated that the defendant must show a privacy interest in the immediate area searched. *See United States v. Salvucci*, 448 U.S. at 95 (remanding to allow the defendants the opportunity to establish "that they had a legitimate expectation of privacy in the areas of [defendant's] mother's home where the goods were seized."); *Rawlings v. Kentucky*, 448 U.S. at 104 (Defendant must show he had a legitimate expectation of privacy in Cox's purse); *Rakas v. Illinois*, 439 U.S. at 148 (Defendants must show that they had "a legitimate expectation of privacy in the particular areas of the automobile searched"). This Court has also stated that "an entry to arrest and an entry to search for and to seize property implicate the same interest in preserving the privacy and the sanctity of the home, and justify the same level of constitutional protection." *Payton v. New York*, 445 U.S. at 588. If Respondent must show a privacy interest in the immediate area, his claim must fail; whatever expectation of privacy Respondent may have had in the areas he used during his overnight stay, Respondent made no showing that he had any privacy interest in the small third floor storage closet in which he was found and arrested.

is away from his home, he may treat some other place—a motel room, a room in his parents' home or in the home of a friend, for example—enough like a home that it will be deemed such for the purposes of the Fourth Amendment's protection of privacy. But his subjective expectation of privacy in a particular place is not sufficient to invoke the Fourth Amendment unless that expectation is one that society is prepared to recognize as objectively reasonable. *California v. Greenwood*, 486 U.S. ——, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988); *Rakas v. Illinois*, 439 U.S. at 143-44, n.12 ("Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."). *Accord Smith v. Maryland*, 442 U.S. 735, 740 (1979). This case raises the question of what facts must be present before society can reasonably find privacy expectations in a second place similar to those in one's own home. The State submits that merely sleeping overnight there is not enough to create those privacy expectations. A defendant must establish ownership or a relationship to the owner; extensive use; or some evidence of control over the premises before a legitimate expectation of privacy can be found.

In determining legitimate expectations of privacy this Court has rejected a "bright line" rule in favor of case by case analysis. *Rakas v. Illinois*, 439 U.S. at 144-48. The Court has had little opportunity, however, to set forth the factors which would help establish a legitimate expectation of privacy. Lower courts have applied several factors, but without guidance from this Court, have reached inconsistent and sometimes incongruous results. *See* State's Petition for a Writ of Certiorari, pp. 14-17 and Brief of Amici Curiae in Support of Petition for Writ of Certiorari, pp. 5-8.



The State submits that the privacy expectations of an overnight visitor are reasonable when some combination of the following independent factors are present:

a) the visitor has some property rights in the dwelling;

b) the visitor is related by blood or marriage to the owner or lessor of the dwelling;

c) the visitor receives mail at the dwelling or has his name on the door;

d) the visitor has a key to the dwelling;

e) the visitor maintains regular or continuous presence in the dwelling, especially sleeping there regularly;

f) the visitor contributes to the upkeep of the dwelling, either monetarily or otherwise;

g) the visitor has been present at the dwelling for a substantial length of time prior to arrest;

h) the visitor stores his clothes or other possessions in the dwelling;

i) the visitor has been granted by the owner exclusive use of a particular area of the dwelling;

j) the visitor has the right to exclude other persons from the dwelling;

k) the visitor is allowed to remain in the dwelling when the owner is absent;

l) the visitor has taken precautions to develop and maintain his privacy in the dwelling.

These factors reflect society's (including police officers') understanding of what makes a dwelling, even a temporary one, a "home." Some factors may be determinative in a particular case; others are not. While each case will present a different mix of factors, the ultimate question remains "whether one's claim to privacy from government intrusion is reasonable in light of all the surrounding circumstances." *Rakas v. Illinois*, 439 U.S. at 152 (Powell, J., concurring).

None of the factors enumerated above were present in the instant case, and therefore any expectation of privacy Respondent had in the Bergstroms' duplex was not reasonable.

For ten days before the crime Respondent's home was Ecker's apartment. Had police entered that home illegally, Respondent's privacy rights would have been violated. In order to elude police, however, Respondent slept one night on the floor in the home of an acquaintance. Even if police had entered that home illegally, Respondent's privacy rights were not violated because his connection to, and control of, the place was so tenuous. To hold that Respondent had no legitimate expectation of privacy in the Bergstroms' home will not destroy the privacy rights of felons in their homes. It will, however, prevent felons from using the Fourth Amendment as a shield to escape apprehension wherever they flee.

## II. DEFENDANT'S WARRANTLESS ARREST WAS REASONABLE UNDER THE FOURTH AMENDMENT BECAUSE IT WAS JUSTIFIED BY EXIGENT CIRCUMSTANCES.

This case presents the following questions:

a) whether, under the exigent circumstances exception to the warrant requirement, police may make a warrantless entry of a dwelling to arrest a defendant who police have probable cause to believe is an accomplice to an armed robbery and murder, and who police believe is in hiding and may be preparing to flee; and

b) if so, whether the exigency justifying immediate entry is destroyed by the officers' presumed ability to stake out the defendant's home while obtaining a warrant. These questions, part of the broader issue of how to define the exigent circumstances necessary to justify a warrantless police entry of a



home to make an arrest, have not yet been decided by this Court.

The Minnesota Supreme Court held that Respondent's warrantless arrest was not justified by exigent circumstances because: 1) Respondent was not the murderer but rather his accomplice; 2) the police had no reason to believe Respondent was armed since they had already recovered the murder weapon; 3) Respondent had not yet left town; and 4) the police could have obtained a warrant, either during the hour while they waited for Respondent's return to the duplex or while they had the house surrounded (J.A.22-25). The Minnesota court specifically held that exigent circumstances did not exist to justify Respondent's warrantless arrest because officers could have continued to stake out the house while trying to obtain a warrant (J.A.23-25). The Minnesota court's decision is based on faulty reasoning and is wrong as a matter of public policy.

The State contends that where, as in this case, police have probable cause to believe that a suspect committed a felony and also have probable cause to believe the suspect will be located in a particular home, they can arrest the suspect there without a warrant if they have specific and articulable facts that a delay to get a warrant will gravely endanger police officers or other persons and will result in the escape of the suspect. When these facts are present, the police need not stake out the suspect's home while obtaining a warrant. Such a holding appropriately balances Fourth Amendment privacy rights against the need for effective law enforcement and protection of the public; it is therefore consistent with existing Fourth Amendment law. Moreover, it is a common sense approach to warrantless home entries which is easily understood and applied by police officers in the field.

### A. Police May Make a Warrantless Entry to Arrest When They Can Demonstrate an Urgent Need to Do So.

The Fourth Amendment proscribes "unreasonable" searches and seizures. In order to assess the reasonableness of a search or seizure, this Court has balanced the governmental interest which allegedly justifies official intrusion against the invasion of privacy that the search or seizure entails. *Terry v. Ohio*, 392 U.S. 1, 21 (1968). Because of the sanctity of the home, warrantless searches and seizures within the home, absent probable cause and exigent circumstances, are presumptively unreasonable. *Payton v. New York*, 445 U.S. 573 (1980). The Court in *Payton* declined to decide what type of emergency or "exigent circumstances" would justify a warrantless home entry to arrest or search. *Id.* at 583. Although the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests, *Welsh v. Wisconsin*, 466 U.S. 740, 749-50 (1984), this Court has recognized several such emergency conditions. *See, e.g. Mincey v. Arizona*, 437 U.S. 385 (1978) (search of homicide scene for victims and the killer); *Michigan v. Tyler*, 436 U.S. 499 (1978) (ongoing fire); *United States v. Santana*, 427 U.S. 38 (1976) (hot pursuit of a fleeing felon); *Warden v. Hayden*, 387 U.S. 294 (1967) (hot pursuit of fleeing felon and possibility of violence to police and others); *Schmerber v. California*, 384 U.S. 757 (1966) (destruction of evidence); *Ker v. California*, 374 U.S. 23 (1963) (potential for flight of felon and destruction of evidence). In short, "a warrantless entry by criminal law enforcement officials may be legal when there is compelling need for official action and no time to secure a warrant." *Michigan v. Tyler*, 436 U.S. at 509.



### B. Respondent's Warrantless Arrest Was Justified Because Police Had Reason to Believe Delay to Obtain a Warrant Would Have Endangered Police Officers and Resulted in Respondent's Escape.

This Court has not specifically decided whether the possibility of flight of a felon believed to be dangerous is an exigent circumstance justifying a warrantless arrest.[14] From the point of view of the police officer in the field, the necessity for quick action under these circumstances is as great as in the true "hot pursuit" situation: if arrest were delayed, a dangerous felon could well destroy evidence, go into hiding, commit more crimes, or harm police officers or others. Delay may well allow the felon to contemplate and prepare an armed confrontation with police or the taking of a hostage. (This danger to the police and the public is discussed more fully at pp. 31-34, *infra*.) Prompt action is even more imperative where, as in this case, the suspect is already in hiding because of the suspect's mobility; in many cases once the tip as to the suspect's whereabouts gets cold, so does the police investigation.

The following facts demonstrate the reasonableness of the police action in this case:

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[14] Lower courts have generally found that the possibility of a dangerous felon's escape or the possibility of violence are exigent circumstances making a warrantless arrest reasonable. *See, e.g. United States v. Cattouse*, 846 F.2d 144 (2d Cir. 1988); *United States v. Davis*, 785 F.2d 610 (8th Cir. 1986); *United States v. Salvador*, 740 F.2d 752 (9th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985); *United States v. Acevedo*, 627 F.2d 68 (7th Cir. 1980); *United States v. Campbell*, 581 F.2d 22 (2d Cir. 1978); *United States v. Flickinger*, 573 F.2d 1349 (9th Cir. 1978); *United States v. Donaldson*, 606 F. Supp. 325 (D. Conn. 1985); *Gaylor v. State*, 284 Ark. 215, 681 S.W.2d 348 (1984); *State v. Chavez*, 98 N.M. 61, 644 P.2d 1050 (1982); *Weddle v. State*, 621 P.2d 231 (Wyo. 1980); *State v. Elderts*, 62 Hawaii 495, 617 P.2d 89 (1980); *People v. Abney*, 81 Ill.2d 159, 407 N.E.2d 543 (1980).

1) The offense involved was murder, the gravest possible offense. In *Welsh v. Wisconsin*, 466 U.S. at 753, this Court held that the gravity of the underlying offense is an extremely important factor to be considered in deciding whether exigent circumstances exist.

2) Respondent was a dangerous felon, despite the fact that he was not the one who pulled the trigger. The police suspected Ecker of committing a series of armed robberies. They had probable cause to believe that Respondent aided Ecker in the commission of this robbery/murder. Their experience in the field led them to believe that Respondent probably also participated in the planning of the offense. To the extent that the co-defendant approves of, and assists in, the commission of a serious, violent offense, a policeman in the field is justified in believing the co-defendant to be just as dangerous as the one who pulled the trigger. Of course, each co-defendant is criminally liable for all of the criminal acts committed during the crime. *See, e.g.* Minn. Stat. §609.05 (1987).

3) The police had reason to believe Respondent might be armed even though the weapon used by co-defendant Ecker was recovered. Belief that Respondent might be armed was reasonable for the following reasons: a) found in Respondent's car were the murder weapon and two empty shoulder holsters for handguns, as well as a pellet gun and a knife; b) Respondent had ample opportunity after his escape from police to obtain a firearm; and c) the offense which Respondent helped commit was armed robbery and murder. The reasonableness of the officer's determination of exigent circumstances, like his determination of probable cause, depends on the information available to him at the time the decision to proceed is made. *Texas v. Brown*, 460 U.S. 730, 742 (1983). That no gun was found at Respondent's arrest does not, therefore, make the officer's belief that he was armed unreasonable.



4) The police had reason to believe Respondent may be preparing to flee, supported by the following facts: a) Respondent had successfully fled police once and was in hiding; b) police had received information that he might flee again; c) Respondent's statement to Julie Bergstrom, "tell them I left," could be reasonably construed by officers as a statement of Respondent's present intent to flee at that moment; and d) the seriousness of the offense and the fact that the Respondent was aware that the co-defendant had been arrested makes flight more likely. *See Welsh v. Wisconsin*, 466 U.S. at 759 (White, J., dissenting) ("The seriousness of the offense with which a suspect may be charged also bears on the likelihood that he will flee and escape apprehension if not arrested immediately.").

5) Although there is no evidence in the record to indicate how long it would have taken police to obtain an arrest warrant,[15] it is clear that a warrant could not have been

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[15] Following is the sole evidence as to this point in the record:

Q. [By defense counsel]: Officer, I assume in the course of your twenty years as a police officer you have secured arrest warrants and arrested individuals based on warrants, is that correct?

A. [By Sergeant DeConcini]: Yes, I have.

Q. And you are aware that when this process is followed that a judge actually has to physically review the warrant and determine if it's proper to arrest somebody, is that correct?

A. That is correct.

Q. And approximately how long—if there is some urgency involved, the process can be expedited, can't it?

A. Yes and no.

Q. Well, you could secure one within a couple hours under normal circumstances, couldn't you?

A. Under normal circumstances, Monday through Friday, from 8:00 a.m. to 4:00 p.m., yes.

Q. Have you ever secured an arrest warrant on a weekend?

A. No.

Q. Have you ever tried?

A. No.

(R.129-30).

obtained quickly, and certainly not before Respondent returned to the duplex. An arrest warrant in Minnesota, unlike a search warrant, must be combined with a criminal complaint, which requires the signature and approval of both a county attorney and a judge. Therefore, in addition to locating a judge, police must locate a county attorney, who must then review all the police reports, decide whether to issue the murder complaint, and have the documents typed and filed. This process takes substantial time during the work week; when the complaint is sought on the weekend the time required is greater still.[16]

Police had probable cause to believe that Respondent had participated in a violent felony using a firearm. They believed he might be armed. They believed he was hiding from police and was preparing to flee. They also had probable cause to believe he was in the duplex. Under these circumstances, warrantless entry to arrest was justified by the probability that the substantial delay involved in getting an arrest warrant would result in Respondent's escape and the endangerment of police officers and others.[17]

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[16] The State submits that whether exigent circumstances exist should not depend on the time required to obtain a warrant. An emergency is an emergency, regardless of the time needed to obtain a warrant.

[17] It could be argued that the police could have avoided a warrantless home entry by waiting outside the duplex in an unmarked squad car and arresting Respondent outside the home when he returned. However, since police believed Respondent was armed, such a plan posed a grave risk of danger to police and neighbors if a shootout on the street of a residential neighborhood ensued. Moreover, the risk of Respondent's escape under that plan was great since Respondent had, only the day before, demonstrated an ability to outrun several police officers. These risks could not be eliminated; dispatching a large number of policemen to the area might minimize the risk, but such a move would greatly deplete police resources and might just as likely escalate possible violence or prevent Respondent's return altogether.



### C. Under the *Dorman* Analysis, Respondent's Warrantless Arrest was Proper; the *Dorman* Analysis, However, Should be Rejected by this Court.

Many lower courts, including the Minnesota Supreme Court, use the so-called *Dorman* factors, either exclusively or as part of a flexible "totality of the circumstances" test, in determining whether exigent circumstances exist to justify a warrantless arrest. These factors, enumerated in *Dorman v. United States*, 435 F.2d 385, 392-93 (D.C.Cir. 1970), include the following: a) the gravity of the offense and whether the crime was a violent one; b) whether the suspect is believed to be armed; c) whether there is a clear showing of probable cause to believe the suspect committed the crime; d) whether the police have strong reason to believe that the suspect is in the premises being entered; e) whether there is a likelihood the suspect will escape if not swiftly apprehended; and f) whether the entry to arrest was peaceful. This Court has declined to approve or disapprove of the *Dorman* analysis, except to adopt the first factor, the gravity of the offense, as important in determining exigent circumstances. *Welsh v. Wisconsin*, 466 U.S. at 751-752. The *Dorman* analysis has been widely criticized as being impractical, inflexible and outdated. *See, e.g.*, 2 W.LaFave *Search and Seizure* §6.1(f) 595, 599-600 (2d ed. 1987); Baldassano, *Police Created Exigencies: Implications for the Fourth Amendment*, 37 Syracuse L.Rev. 147, 154-156 (1986); Harbaugh & Faust, *"Knock on any Door"—Home Arrests After Payton and Steagald*, 86 Dick L.Rev. 191, 224-25 (1982); *Note, Exigent Circumstances for Warrantless Home Arrests*, 23 Ariz. L.Rev. 1171, 1173-75 (1981).

Application of the *Dorman* analysis to the facts of this case compels a finding of exigent circumstances: The crime was a grave, violent one; Respondent was believed to be armed;

police had probable cause to believe Respondent committed the crime and to believe he was in the duplex; police had good reason to believe Respondent might flee; and the entry to arrest was peaceful.[18] Nevertheless, the State submits that the *Dorman* analysis should be rejected by this Court. Not only are some of the factors now invalid or obsolete,[19] but a checklist of numerous factors is virtually impossible for a police officer to evaluate on the spot. The factors can be difficult to assess individually, and the difficulty is compounded by the fact that the *Dorman* court did not indicate how the factors were to be weighed, and what the result would be if some, but not all, of the factors were present.[20] This rule does not enable well-intentioned police officers to decide quickly whether exigent circumstances exist, and is therefore unworkable.

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[18] Police knocked on the door, which was answered by Louann Bergstrom (R.184-85).

[19] The defendant in *Santana* was not armed. Nor has this Court explicitly required a higher quantum of probable cause or a peaceful entry in its cases discussing exigent circumstances.

[20] *See* 2 W.LaFave, *Search and Seizure*, §6.1(f) at 600:

> For example, take the situation presented by *United States v. Lindsay*: the court, after a careful and elaborate evaluation of "all the circumstances surrounding the entry," was able to conclude that the first, second and sixth *Dorman* factors were present, that the third and fourth factors were not present, that the arguments on both sides concerning the fifth factor were "of equal weight," and that the seventh factor was a washout (as it will ordinarily be, since it "works in more than one direction"). Even assuming the police were able to resolve each of these seven issues in a like manner while they were outside the premises, does this tell them that a warrantless entry may be made or that it may not be made? Though *Lindsay* holds that a warrantless entry is unconstitutional on such facts, it is to be doubted that an officer could have reached that conclusion with confidence on the basis of *Dorman*, just as it is to be doubted that *Lindsay* affords a basis for him to decide a case involving a somewhat different mix of factors [footnotes omitted].



A judicial application of the *Dorman* "rule" will, in general, result in a finding of exigency where police have probable cause, knowledge of the suspect's whereabouts, and facts indicating that the suspect is dangerous and about to flee. Restating the *Dorman* rule in this simpler way eliminates the need for lengthy discussion and weighing of numerous factors, while yet retaining *Dorman's* essential requirements. The requirements that remain after this distillation of the *Dorman* rule involve judgments that police officers are forced to make daily. Therefore, officers can apply the distilled rule more quickly and more consistently than the original rule.

### D. Under the Circumstances of this Case Police Were not Required to Stake Out the Duplex While Seeking a Warrant.

The Minnesota Supreme Court held that the warrantless arrest was unconstitutional because the officers had surrounded the duplex and could have continued to stake out the house while trying to obtain a warrant. The court's holding is contrary to public safety and common sense. The court's assertion ignores the reality that to maintain surveillance of the "hideout" of a felon connected with an armed robbery and murder is extremely dangerous to the police, to the defendant, to the other occupants of the house, and to the public at large. Had the police maintained a stakeout at the duplex for the several hours required to obtain a murder complaint (or even a search warrant), Respondent, who knew he was involved in a robbery/murder, and that police were outside, may well have become desperate to escape. The stakeout would give him time to explore his options, including an armed shootout with the police or the taking of a hostage from within. A desperate Respondent may well have turned on his acquaintances, decid-

ing perhaps that one of the Bergstroms must have reported his whereabouts to police. Meanwhile, the presence of numerous squad cars in a populated area not only disrupts local activities, but may well draw curious bystanders to the area where they could be harmed by the defendant's likely resistance to arrest. "The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others," *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967).

Moreover, stakeouts are not always effective in preventing escape. For examples of stakeouts that did not work, *see United States v. Cattouse*, 846 F.2d 144, 147-48 (2d Cir. 1988); *United States v. Donaldson*, 606 F.Supp. 325, 332 (D. Conn. 1985).

For these reasons several lower courts have held that a police stakeout is not required under facts similar to those in the instant case. *See United States v. Salvador*, 740 F.2d 752 (9th Cir. 1984), *cert. denied* 469 U.S. 1196 (1985); *United States v. Webster*, 750 F.2d 307 (5th Cir. 1984); *United States v. Williams*, 612 F.2d 735, 739 (3rd Cir. 1979), *cert. denied* 445 U.S. 934 (1980) ("[A]n immediate response by entry was necessary to prevent the occurrence of contingencies which would have made appellant's capture alive and without harm to the police or others impossible, or at least, unlikely; i.e., that appellant would barricade himself in the residence and engage in a shootout or attempt an armed escape with or without hostages."); *United States v. Campbell*, 581 F.2d 22 (2nd Cir. 1978); *United States v. Brightwell*, 563 F.2d 569 (3rd Cir. 1977), *cert. denied* 439 U.S. 849 (1978); *United States v. McLaughlin*, 525 F.2d 517, 521 (9th Cir. 1975), *cert. denied*, 427 U.S. 904 (1976) ("The officers . . . could take their chances with respect to the destruction of the evidence, obtain reinforcements, and settle in for several hours of siege while awaiting the arrival of the warrant, or move quickly to arrest the occupants and to secure the premises and the evidence while awaiting the arrival of the warrant. We cannot accept the view that the Fourth Amendment requires that the officers pursue the former course. To do so would ignore the legitimate interests of the neighbors whose surroundings should not be impressed with a state of siege, innocent persons who might be injured accidentally as a consequence of a large number of armed and mobile men, and the interest of the general public in efficient law enforcement and certain punishment for wrongdoers."); *United States v. Shye*, 492 F.2d 886, 892 (6th Cir. 1974) ("Although there was little likelihood of escape, due to the presence of so many officers, there was, nevertheless, a substantial likelihood of bloodshed or an impending siege if quick action were not taken."); *State v. Girard*, 276 Or. 511, 515, 555 P.2d 445, 447 (1976) ("Defendant argued that the two officers could have 'surrounded' the house to avoid escape while they waited for reinforcements. That involves a large measure of speculation, depending upon a variety of factors relating to the feasibility of 'surrounding' the house or otherwise preventing escape, including the size of the house, the number of exits, the proximity of the house to cover for a person bent on escape, visibility, etc. In the exigencies of the moment, the officers could not reasonably be expected to put fine weights in the scale in weighing the chances of securing the house or of losing their quarry.") *See also* 2 W. LaFave, *Search and Seizure*, § 6.1(f), at 605-06 ("Not infrequently, a prompt entry to arrest is called for in order to minimize the risk that someone will be injured or killed. Sometimes the risk is to another person who is also in the premises to be entered, such as an undercover agent or informant, a possible hostage, or an individual the person to be arrested knows has cooperated with the

police. Delay may also increase the risk of harm to persons outside the premises. The passage of time may enhance the ability of those inside to make an effective forcible resistance when the police ultimately make their entry to arrest. And if the police are required to stake out the premises while a warrant is obtained, this may cause curious bystanders to gather in the immediate vicinity, where they might well be harmed in the event of forcible resistance to the police entry.").[21]

It has been suggested that the question of whether or not the police must stake out the premises to obtain a warrant should depend on whether the arrest was planned in advance, in which case a warrant is required unless exigent circumstances exist before police go out into the field; or whether it was made in the course of an ongoing investigation in the field, in which case a warrantless arrest is presumptively legal. 2 W.LaFave, *Search and Seizure* §6.1(f) at 600-602. The Minnesota Supreme Court, relying on this distinction, characterized the arrest as "planned" because police made a decision to arrest Respondent when he returned to the duplex, and no warrant was sought during the 45 minutes between that decision and the actual arrest. Respondent's arrest, however, was not a truly "planned" arrest, where police, after completing their field investigation, decide to arrest the defendant hours, days or weeks later at some convenient time. (*See, e.g.*, the facts surrounding the arrests of Payton and

[21] *But cf. United States v. Patino*, 830 F.2d 1413 (7th Cir. 1987); *United States v. Alvarez*, 810 F.2d 879 (9th Cir. 1987); *United States v. Adams*, 621 F.2d 41 (1st Cir. 1980); *People v. Atkinson*, 116 Misc.2d 771, 456 N.Y.2d 328 (1982); and *State v. Peller*, 287 Or. 255, 598 P.2d 684 (1979) (Courts decide warrantless entry was not justified by exigent circumstances under facts of case; courts suggest that police should have staked out the premises until a warrant could be obtained).



Riddick in *Payton v. New York*, 445 U.S. 573 (1980).) Respondent's arrest was the culmination of an ongoing, continuous field investigation into the identity and present location of Ecker's co-defendant. At 2:00 p.m. Sergeant DeConcini received the information corroborating the informant's tip. He then believed that Respondent was probably Ecker's co-defendant and that he may be returning to the duplex. At that time Sergeant DeConcini felt he had probable cause to arrest Respondent, and he issued the "pickup order." He did not "plan" to arrest Respondent at the duplex; while he may have hoped to arrest Respondent soon at that address, Sergeant DeConcini did not know for certain whether, and when, Respondent would return to the duplex. When Sergeant DeConcini issued his "pickup order," he intended to arrest Respondent wherever he could be found—on the street, in the bus depot, at the duplex, or someplace else. A warrant was not required to arrest Respondent on the street or in the bus depot or other public place, *United States v. Watson*, 423 U.S. 411 (1976); only if Respondent were found in a private home might a warrant be necessary.[22] Sergeant DeConcini did not obtain a warrant to cover this possibility because he knew a great deal of time would be required to obtain one and he believed he was faced with an emergency situation: the necessity of arresting a felon who was involved in a murder and was in hiding, before he could flee the city or harm anyone else.

Moreover, even if exigent circumstances did not exist before police surrounded the duplex, the necessity for quick police action arose after police arrived at the home. An exigency requiring police action may arise at any time after probable

[22] Sergeant DeConcini did not believe that Respondent had any privacy expectations in the Bergstroms' home; all the facts he possessed indicated otherwise.

cause is established. *See Cardwell v. Lewis*, 417 U.S. 583, 595-96 (1974) ("Assuming that probable cause previously existed, we know of no case or principle that suggests that the right to search on probable cause and the reasonableness of seizing a car under exigent circumstances are foreclosed if a warrant was not obtained at the first practicable moment. . . . The exigency may arise at any time, and the fact that the police might have obtained a warrant earlier does not negate the possibility of a current situation's necessitating prompt police action.") Before entering the duplex, police telephoned and asked Respondent to come out; by doing so police were able both to confirm that Respondent was in the duplex and to give Respondent an opportunity to come out of the duplex, either to give himself up peaceably or to further the police investigation by explaining his innocence. However, when police heard a male, presumably Respondent, instruct "Julie" to "tell them I left," police could reasonably have decided that Respondent intended to flee; under the facts of this case, police were then justified in entering immediately to prevent Respondent's escape.

This case clearly demonstrates many of the difficulties faced by police officers in the field, which were described by Justice White in his dissenting opinion in *Payton v. New York*, 445 U.S. at 618-619:

> The policeman on his beat must now make subtle discriminations that perplex even judges in their chambers. As Mr. Justice Powell noted, concurring in *United States v. Watson*, *supra*, police will sometimes delay making an arrest, even after probable cause is established, in order to be sure that they have enough evidence to convict. Then, if they suddenly have to arrest, they run the risk that the subsequent exigency will not excuse their prior



failure to obtain a warrant. This problem cannot effectively be cured by obtaining a warrant as soon as probable cause is established because of the chance that the warrant will go stale before the arrest is made.

Further, police officers will often face the difficult task of deciding whether the circumstances are sufficiently exigent to justify their entry to arrest without a warrant. This is a decision that must be made quickly in the most trying of circumstances. If the officers mistakenly decide that the circumstances are exigent, the arrest will be invalid and any evidence seized incident to the arrest or in plain view will be excluded at trial. On the other hand, if the officers mistakenly determine that exigent circumstances are lacking, they may refrain from making the arrest, thus creating the possibility that a dangerous criminal will escape into the community. The police could reduce the likelihood of escape by staking out all possible exits until the circumstances become clearly exigent or a warrant is obtained. But the costs of such a stakeout seem excessive in an era of rising crime and scarce police resources.

The primary reason for the warrant requirement is to interpose a "neutral and detached magistrate" between the citizen and the possibly overzealous police officer. But when, as in this case, the officer faces an emergency requiring immediate action to prevent possible death or injury, the warrant requirement must yield. To hold otherwise is to tilt the equilibrium between privacy rights and public safety.

## CONCLUSION

The judgment of the Minnesota Supreme Court should be reversed.

Respectfully submitted,

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## QUESTIONS PRESENTED

1. Relying on information provided by a fictitious informant, Minneapolis police officers directed Respondent's arrest in a dwelling where he temporarily resided. Police officers did not attempt to obtain an arrest warrant before storming the home. Prior to his arrest, Respondent was given permission to stay indefinitely at this dwelling by its residents, had no immediate intention of leaving the premises, received guests at the home and, if he chose, had the right to exclude persons from the dwelling. Under these circumstances, did Respondent have a reasonable expectation of privacy in his temporary residence sufficient to enable him to challenge his warrantless arrest under the Fourth and Fourteenth Amendments to the United States Constitution?

2. On Sunday, July 19, 1987, Minneapolis police received information from a fictitious informant implicating Respondent in a robbery and murder which occurred the previous day. Minneapolis police officers took no steps to identify the informant, nor did they attempt to contact the persons claimed by the fictitious informant to have specific knowledge of Respondent's claimed involvement in the offense. Those individuals later testified at a pre-trial hearing that they had no information regarding the July 18, 1987 offense nor were they even acquainted with Respondent. Although, on Saturday, July 18, 1987, other police officers needed only two and one-half hours to obtain a search warrant for Respondent's vehicle, Minneapolis police officers made no effort to secure an arrest warrant on July 19, 1987. The investigating officer testified at a pre-trial hearing that he did not do so because he did not wish to disturb local prosecutors during their leisure time. Although the July 18, 1987 offense did involve a violent crime, the murder weapon was recovered at the scene, police officers had no reason to believe that Respondent was armed or that his presence was endangering the residents of the home where he temporarily resided. The police were aware that Respondent was staying at this dwelling with the explicit consent of the building's tenants. There was no danger that delay in arresting

Respondent would lead to the destruction of evidence; although a delay would have permitted the police to investigate the credibility of the fictitious tipster's information. Under these circumstances, do any exigent circumstances exist justifying the subsequent warrantless storming of Respondent's residence by police officers bearing shotguns and drawn revolvers?



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## STATEMENT

On July 18, 1987 a lone gunman entered a service station in Minneapolis, Minnesota (RHT. 48-60).[1] During the course of an armed robbery, this person shot station manager Roger Reinhardt (T. 30). Mr. Reinhardt later died as a result of this gunshot wound (T. 217).

Immediately after the gunman fled the scene, the robbery and shooting were reported to law enforcement officials. Minneapolis police dispatchers summoned police units to the service station and broadcast information describing the robbery, shooting, and suspect's physical appearance. (RHT. 48, 60). Two Minneapolis police officers, Officers Grabowski and Pihl, heard this report (RHT. 48, 60, T. 149). Officer Pihl believed the single suspect's general physical description and behavior matched that of Joseph Ecker, a suspect in other recent armed robberies (RHT. 60-61, T. 150). The officers traveled to Mr. Ecker's home at 2420 Polk Avenue N.E. (RHT. 60, T. 150).[2]

As the officers waited in an alleyway alongside the home, a brown Oldsmobile approached their squad car (RHT. 10, 64, T. 153). Officer Pihl immediately exited the squad car, drew his service revolver, and pointed it at the

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[1] "RHT" refers to the transcript of the pretrial suppression hearing conducted pursuant to Minnesota Rule of Criminal Procedure 11.02. This procedure is generally mandated by *State ex rel. Rasmussen* v. *Tahash*, 272 Minn. 539 141 N.W.2d 3 (1965). Consequently, this hearing is labeled a "Rasmussen" hearing and transcript references will be abbreviated "RHT" in this brief. "T" refers to the trial transcript.

[2] When officer Pihl came on duty at approximately 11:00 P.M. on July 17, 1987, he was presented with a "flyer" describing the previous robberies which identified Mr. Ecker as the sole suspect in those offenses (RHT. 62). This document listed Mr. Ecker's address as 2420 Polk Avenue N.E., Minneapolis, MN.

driver of the brown automobile (RHT. 11, 65, T. 154, 174).[3] Officer Grabowski reached into the rear of the police vehicle and began to remove a pump action shotgun (RHT. 11, T. 174). The brown automobile began backing away from the police car, turned in a "T portion" of the alleyway and proceeded "rapidly" northbound down the alleyway in apparent flight (RHT. 11, 66, 78, T. 154). Officers Pihl and Grabowski re-entered their patrol vehicle and began pursuing the brown Oldsmobile (RHT, 11, 65, 66). The driver lost control of the automobile as he attempted to exit the alleyway (RHT. 12, 16, 68, T. 155). As Officers Pihl and Grabowski approached the area, two individuals exited the Oldsmobile and fled on foot (RHT. 14, 69, T. 155). Officers Pihl and Grabowski attempted to chase these persons on foot, but quickly lost sight of each (RHT. 16-17, 69-71, T. 159). Within a few moments, other Minneapolis police officers arrived at the scene. The officers entered the house at 2420 Polk Avenue N.E. and emerged, in a few minutes, with Joseph Ecker in custody (RHT. 17-18, 72, T. 165). Mr. Ecker was later positively identified as the gunman who robbed the service station (T. 61, 86). Respondent's picture did not appear in the photographic lineup used to obtain Ecker's identification (T. 96).

Minneapolis police detective Robert R. Nelson arrived at 2420 Polk Avenue at approximately 6:15 A.M. (RHT. 98). Detective Nelson conducted a brief examination of the Oldsmobile and removed a Certificate of Title from the automobile. This Certificate identified the automobile's owner as Keith Jacobson (RHT. 99, T. 263-264). Detective Nelson also removed a letter from the vehicle. That letter was addressed to "Roger R. Olson" (RHT. 106, T. 225). It

[3] Both Officers Grabowski and Pihl testified that they only observed one individual inside the vehicle at this time (RHT. 10).



concerned an insurance claim from May, 1987 (T. 225). Detective Nelson then returned to 2420 Polk Avenue N.E. where he had separate conversations with Mr. Ecker and Dawn Corr, who was present in the house at the time Mr. Ecker was arrested (RHT. 102, 109). Neither individual identified Respondent as the driver or the passenger in the automobile which fled from Officers Pihl and Grabowski (RHT. 102, 109). Detective Nelson then attempted to locate automobile's registered owner, Keith Jacobson, without success (RHT. 104, T. 226). Detective Nelson did not issue arrest orders for either Mr. Olson or Mr. Jacobson (RHT. 104, 131).

Detective Nelson later returned to his office and related his investigation and observations to Minneapolis police detective Michael Sauro. Detective Sauro promptly secured a search warrant for the Oldsmobile and the home at 2420 Polk Avenue N.E. (RHT. 87). Although this was a Saturday morning, Detective Sauro was able to obtain the search warrant within two and one-half hours (RHT. 87-88). Detective Sauro subsequently seized a variety of materials from the home and automobile. The only item found in the automobile which bore any connection with Respondent was a videotape rental slip dated July 16, 1987 (RHT. 85, 93, T. 367, 369).[4] When Detective Sauro

[4] In its Brief, the prosecution asserts a variety of documents were found in the vehicle linking Respondent . . . to the car". The prosecution's Brief also notes that "a pellet gun . . . a knife, a knife sheath and two empty shoulder holsters for handguns . . ." were also found in the vehicle. In reality, although the prosecution introduced a bounty of goods seized from the vehicle, the items bore no indication of ownership. Detective Sauro admitted that the shoulder holsters did not bear Mr. Olson's name or initials (T. 372) and that at least one of the holsters found in the trunk bore salt stains suggesting it had been there for some time—long before Respondent's purchase of the vehicle (T. 371).

executed the search warrant at 2420 Polk Avenue, he too found Dawn Corr present (RHT. 88). He interviewed Ms. Corr who stated that a number of people were with Mr. Ecker the previous evening (RHT. 89). Respondent was not included in that list (RHT. 89).

The following day, July 19, 1987, a woman identifying herself as "Diana Murphy" telephoned Minneapolis police detective James DeConcini and, for the first time, made direct accusations against Respondent. This informant apparently told officers that "a guy named Rob" was staying with "LouAnn" and "Julie" at 2406 Fillmore N.E. and had told someone named "Marie" that he was one of the men who had fled from the police the preceding day (RHT. 113-114). Detective DeConcini was not familiar with the informant and took no steps to confirm her identify (RHT. 121, 123). Detective DeConcini conceded that he had 1986-1987 telephone directories available to him on July 19, 1987 but simply did not bother employing them to confirm the informant's identity (RHT. 123). Detective DeConcini admitted that if he had made this minimum effort he would have discovered that the name provided to him by this informant was, in fact, fictitious (RHT. 124). Detective DeConcini never spoke with "Maria", Julie or LouAnn Bergstrom to confirm the information provided by "Diana Murphy" (RHT. 122-125). He did, however, request Minneapolis police officers to travel to 2406 Fillmore Avenue N.E. to "locate Julie or LouAnn at that address and have one or both of those parties call me to verify the information given to me by Ms. Murphy" (RHT. 114).[5]

[5] Interestingly, another witness, Officer VonLehe, contradicted Detective DeConcini's version of these events and stated that when Minneapolis police officers initially went to 2406 Fillmore on July 19, 1987, it was, at Detective DeConcini's instruction, for the express purpose of arresting Mr. Olson, not to get corroborating information (RHT. 142).



When officers first visited the home at 2406 Fillmore N.E., they discovered it was a duplex and that LouAnn and Julie Bergstrom resided in the upper unit. Neither Julie Bergstrom nor her mother, LouAnn, were home and officers spoke with the downstairs resident, Helen Niederhoffer (RHT. 114). Ms. Niederhoffer stated that a "party known to her as Rob Olson had been staying upstairs . . ." (RHT. 114). She agreed to telephone police when Mr. Olson returned (RHT. 115). Ms. Niederhoffer added that she was not privy to any conversation with Respondent regarding his alleged involvement in the July 18, 1987 robbery (RHT. 125).

Ms. Niederhoffer telephoned Detective DeConcini at approximately 2:30 P.M. on July 19, 1987 and advised him that Mr. Olson had returned to the home at 2406 Fillmore (RHT. 137). Detective DeConcini then instructed Minneapolis police officers to surround the home and arrest Mr. Olson (RHT. 136-137). Detective DeConcini made no effort to obtain an arrest warrant prior to issuing this instruction (RHT. 127). Even though Detective Sauro had been able to procure a search warrant within two and one-half hours on the proceeding day, Detective DeConcini stated that it never occurred to him to obtain an arrest warrant and that he had never attempted to secure an arrest warrant on a weekend during his twenty years as a Minneapolis police officer (RHT. 129-130). Detective DeConcini added that he was also reluctant to disturb local prosecutors on Saturday or Sunday and disrupt their leisure time (RHT. 116).

Acting at Detective DeConcini's direction, Minneapolis police officers entered the Bergstrom home and arrested Mr. Olson (RHT. 139).[6] When entering the home these

[6] Respondent was arrested in an upstairs closet (T. 414). He did not threaten officers or resist arrest (T. 414).

officers did so with drawn revolvers and shotguns (RHT. 185-186, T. 542, 414). They did not seek consent of any occupant or resident before storming the building (RHT. 54, 145, 155, 198, 219, T. 413). Following Respondent's arrest, Minneapolis police officers transported Mr. Olson, LouAnn Bergstrom, Julie Bergstrom, and others seized at the premises to the Minneapolis Police Department Homicide office (RHT. 154, 165-166). While in custody, Respondent provided a statement to Sgt. Steven Sawyer, in which he admitted driving the brown Oldsmobile on July 18, 1987, but denied any involvement in the offense. Respondent stated that he was unaware of Mr. Ecker's intentions and was an innocent dupe (T. 389-396).

On August 11, 1987, the Hennepin County Minnesota Grand Jury indicted both Respondent and Joseph Ecker on charges of first degree felony murder contrary to Minnesota Statutes Section 609.185(3), aggravated robbery in violation of Minnesota Statutes Section 609.245, and second degree assault under Minnesota Statutes Section 609.222. At a pre-trail hearing Respondent timely moved to suppress his post-arrest statement on the grounds that his warrantless arrest violated the Fourth and Fourteenth Amendments of the United States Constitution. Respondent contended that the arrest was made without probable cause, that Respondent had a legitimate expectation of privacy in his temporary residence. Consequently, Respondent contended that his warrantless arrest directly contravened the principles set forth by this Court in *Payton* v. *New York*, 445 U.S. 573 (1980). The State replied that it could rely on its fictitious informant to create probable cause and that Respondent lacked "standing" to raise the constitutional issues related to the invasion of the home at 2406 Fillmore. The State also asserted that even if Respondent could raise this claim, exigent circumstances justified the warrantless arrest.



The testimony produced at the pre-trail hearing unequivocally demonstrated that Respondent was an authorized guest at this home, intended to stay there indefinitely, and had the tenant's permission to do so. In addition, Mr. Olson kept a change of clothes at the premises and had the right to allow or refuse visitor's entry. (RHT. 184, 192, 198, 217, 220). In particular, Mr. Olson testified:

> Q. Did you intend to continue staying at that address?
>
> A. Yes.
>
> Q. Did you have any other place to stay?
>
> A. No, I did not.
>
> Q. Were you ever asked to leave by the Bergstrom's?
>
> A. No, I was not.
>
> Q. . . . When you talked to your friends, if you told them to meet you some place, where would you tell them to meet you?
>
> A. I told them to meet me at that address.
>
> Q. If you told them to call you on the telephone, what number would you give them?
>
> A. Julie's number (RHT. 217-218).

The Trial Court rejected each of Respondent's claims. It rebuffed Respondent's probable cause attacks by concluding "the information provided by Diana Murphy could properly be considered by Sgt. DeConcini for purposes of establishing probable cause even though the true identity of Diana Murphy was, and remains, unknown." The Court refused to consider Respondent's other challenge by concluding that he had no reasonable expectation of privacy in the dwelling located at 2406 Fillmore Avenue N.E.

Interestingly, the Court based this determination, at least in part, on its conclusion that the Respondent was "a fugitive from a criminal investigation . . . therefore . . . any expectation of privacy the Defendant may have had was unreasonable."[7]

On February 11, 1988, Respondent was convicted of one count of first degree felony murder, three counts of armed robbery, and three counts of aggravated assault. The jury acquitted Respondent of one count of first degree felony murder.[8] On March 29, 1988 Respondent appealed his conviction to the Minnesota Supreme Court. Respondent's Appeal alleged numerous errors warranting reversal of his conviction. The Minnesota Supreme Court concluded that Respondent did possess a legitimate expectation of privacy in the dwelling at 2406 Fillmore and that his warrantless arrest directly contravened the Fourth and Fourteenth Amendments to the United States Constitution. Accordingly, the Minnesota

[7] The Trial Court's conclusion that Respondent had no expectation of privacy because he was the subject of a criminal investigation is absolutely insupportable. At the time Respondent began his stay at the Bergstrom home, he was not sought by police. Mr. Olson's arrest was not directed until after he began staying at the Bergstrom home. Moreover, even if literally true, the fact that an individual is the subject of a criminal investigation does not strip him or her of an expectation of privacy in certain places. In every instance where a Court has concluded that a warrantless arrest was unjustified, the individual arrested was the subject of a criminal investigation. If the person asserting a Fourth Amendment right was not the subject of a criminal investigation, he or she simply would not have been arrested. Holding that anyone who is the subject of a criminal investigation is bereft of any expectation of privacy in his or her dwelling will, by definition, emasculate the Fourth Amendment.

[8] The jury convicted Respondent of violating Minnesota Statutes Section 609.185(3) but acquitted him of a companion charge alleging a violation of Minnesota Statutes Section 609.185(1).



Supreme Court reversed Respondent's conviction and remanded this case for a new trial. The State subsequently filed a Petition for Rehearing which was denied by the Minnesota Supreme Court on March 28, 1989 (J.A. 27). Certiorari was granted by this Court on October 2, 1989.

## SUMMARY OF ARGUMENT

### 1. Legitimate Expectation of Privacy.

The Minnesota Supreme Court properly held that Respondent had a reasonable expectation of privacy in the dwelling where he was arrested sufficient to warrant invocation of his Fourth Amendment right to be free from unreasonable search and seizure. The Minnesota Supreme Court's decision was well grounded in fact and supported by objective criteria. At the time of his arrest, Respondent was temporarily residing with LouAnn Bergstrom and her daughter, Julie, at 2406 Fillmore, Minneapolis, Minnesota. Respondent: (1) had the owner's permission to stay at the home, (2) had stayed there since the July 18, 1987 robbery, (3) intended to stay for an indefinite period, (4) kept a change of clothes at the premises, (5) had the express, albeit limited, authority to admit or refuse guests. (J.A. 21). Under these circumstances, the Minnesota Supreme Court's decision is consistent with this Court's determination in *Jones* v. *United States* as subsequently limited by *Rakas* v. *Illinois*. Petitioner's challenge to the Minnesota Supreme Court's decision can succeed only if this Court is willing to expressly overrule *Jones* v. *United States*.

### 2. Exigent Circumstances.

As established by this Court's earlier decisions in *Payton* v. *New York* and *Welsh* v. *Wisconsin*, Respondent's warrantless arrest is presumptively unlawful. It can

only be sanctioned if accompanied by an exigent circumstance. Petitioner bears a heavy burden in establishing an urgent need justifying Respondent's warrantless arrest. Petitioner has failed to meet this obligation. Petitioner has not demonstrated that procuring a warrant would have delayed Respondent's arrest, nor can it do so. The investigating officer acknowledged that, in Minnesota, an arrest warrant can generally be procured within a few hours. That officer, however, testified that in his twenty years of police experience he had never before sought a warrant during a weekend. Because other police officers were able to secure a search warrant in this case the previous day, Saturday, in less than three hours, it can be presumed that the warrant process in Minnesota moves with speed and precision. For this reason alone, the Minnesota Supreme Court properly determined that no exigent circumstances justified dispensing with the warrant requirement. Even if a warrant would have delayed Respondent's arrest, the State has not been able to articulate any basis for believing that the delay would endanger the police, Respondent, or the community. Each supposed "exigency" cited by Petitioner is, on examination, baseless speculation. Even if an exigency did exist, it was created through the conscious efforts of Minneapolis police officers and cannot be used to buttress their arrest decision. For these reasons, the Minnesota Supreme Court properly applied the *Dorman* analysis in determining that the police had failed to establish any exigency justifying Mr. Olson's warrantless seizure. The *Dorman* analysis is a useable framework and affords reasonable predictability. The test of exigency advocated by Petitioner and the Solicitor General will, in application, emasculate this Court's holding in *Payton* v. *New York* by making every felony arrest an emergency.



## ARGUMENT

### I. The Minnesota Supreme Court Properly Concluded That The Warrantless Storming Of Respondent's Temporary Residence By Police Officers Transgressed Respondent's Fourth Amendment Rights.

In its unanimous decision the Minnesota Supreme Court concluded that Respondent held a legitimate expectation of privacy in his temporary dwelling sufficient to permit invocation of Fourth and Fourteenth Amendment safeguards. That tribunal based its determination, in part, on the factual similarity between this proceeding and *Jones* v. *United States*, 362 U.S. 257 (1960). Simultaneously, the Minnesota Supreme Court acknowledged that *Rakas* v. *Illinois*[9] limited the scope of this Court's earlier decision but commented that *Rakas* expressly reaffirmed the factual holding of *Jones* (J.A. 21).

Petitioner argues that this decision will "greatly enlarge the class of persons who may invoke the exclusionary rule . . ." and "drastically [shift] the delicate balance between privacy rights and effective law enforcement . . ." (Petitioner's Brief, p. 13).[10] This claim dramatically overstates the effect of the lower Court's opinion. In reality, the Minnesota Supreme Court's decision simply reminds police authorities of their fundamental obligation to make arrests only within the parameters of the Fourth Amendment's warrant requirement.[11]

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[9] 439 U.S. 128 (1978)

[10] Hereafter, Petitioner's Brief will be cited, understandably, as "Petitioner's Brief." The separate Amicus Briefs prepared by several law enforcement organizations and the Solicitor General will be referred to as "Amicus Brief" and "Solicitor General's Brief" respectively.

[11] Petitioner contends that the Minnesota Supreme Court's decision "contradicts the common sense understanding of home that

Relying on uncorroborated and uninvestigated assertions from a fictitious informer, police directed Respondent's arrest. They did so without seeking an arrest warrant. The investigating officer, Detective DeConcini, testified at the pretrial suppression hearing that in nearly two decades as a police officer he had never attempted to obtain an arrest warrant during a weekend (RHT. 130). Detective DeConcini added that one consideration underpinning his refusal to do so was his reluctance to disturb local prosecutors on Saturday or Sunday. (RHT. 116). Understandably, the Minnesota Supreme Court did not view these events favorably. Its decision does not drastically shift any jurisprudential balance between individual privacy and police power. Rather, the Minnesota Supreme Court's decision appropriately reproached police officers for blithely ignoring long standing constitutional safeguards. Police zeal to make a prompt arrest for a serious crime is laudable. However, seven members of the Minnesota Supreme Court recognized that this well-intentioned desire cannot excuse the nonconsentual

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citizens and police officers alike share. This assertion itself is questionable. Mr. Olson's arrest was effected at his residence—albeit a temporary one. Police and Courts alike must recognize that not every citizen enjoys a comfortable lifestyle featuring long-term stability. For much of society, residence is surprisingly transitory. The lay person, unschooled in the nuances of criminal procedural rights, is generally aware only that police generally must secure warrants before undertaking a search or seizure. Conceivably "public perception" of the Fourth Amendment's scope is more broadly conceived by society as a body than by judicial officers. For this reason, a number of commentators have suggested that the focal point for analysis is not on the public's "common sense understanding" or current expectations, but on what privacy expectations citizens can demand society honor. Bacigal, *Some Observations and Proposals on the Nature of the Fourth Amendment*, 46 Geo. Wash. L. Rev. 529, 536 (1978), Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 Calf. L. Rev. 1593, 1611 (1987).



storming of Respondent's dwelling by armed officers who made no pretense of first seeking judicial approval.

**A. The Minnesota Supreme Court Correctly Determined That Respondent Has A Reasonable Expectation Of Privacy In His Temporary Dwelling Sufficient To Permit Invocation Of Fourth And Fourteenth Amendment Safeguards.**

As its core, the Fourth Amendment guarantees an individual's right to be free from unreasonable searches and seizures performed by police authorities. *Silverman* v. *United States*, 365 U.S. 505 (1961). This safeguard has been made applicable to state action by virtue of the Fourth Amendment. *Mapp* v. *Ohio*, 367 U.S. 643 (1961). Admittedly Fourth Amendment rights are personal in nature and may not vicariously asserted. *Brown* v. *United States*, 411 U.S. 223, 230 (1973). For that reason Respondent's ability to raise these constitutional claims requires that a right personal to him be transgressed. Traditionally, Courts have viewed this concept as "standing" to challenge a search or seizure. In the continuing evolution of constitutional law, the catch phrase "standing" is no longer entirely accurate. Beginning with *Katz* v. *United States*, analysis of the Fourth Amendment's scope has focussed on an individual's privacy expectations. Commenting that "The Fourth Amendment protects people, not places" this Court held that whenever a person possesses a reasonable expectation of privacy in a particular context he can avail himself of the protection granted by the Fourth Amendment. 389 U.S. 347, 351 (1967).

Respondent concedes that he did not have a formal tenancy interest in the residence (RHT. 189). However, he was in the home with the knowledge, consent and permission of its tenants (RHT. 184, 194-195). LouAnn Bergstrom testified that Respondent had the right to allow visitors into the premises or to refuse them entry

(RHT. 192).[12] Julie Bergstrom testified that Mr. Olson had permission to reside at the home for an indefinite period (RHT. 198). Respondent confirmed this statement (RHT. 220). Although Mr. Olson did not possess any furniture at the residence, he did have changes of clothes with him and intended to stay at this home for the indefinite future (RHT. 220).

Nonetheless, Petitioner claims that the Minnesota Supreme Court erred in concluding that Respondent had a legitimate expectation of privacy in the dwelling where he was arrested. The State challenges the factual foundation of the Minnesota Supreme Court's decision and parades a litany of items earlier accepted by the trial Court to strip away Respondent's right to challenge his warrantless arrest. (Petitioner's Brief, p. 16). These arguments were considered, and rejected, by the Minnesota Supreme Court, which noted:

> The trial court found that Olson had no reasonable expectation of privacy in the 2406 Fillmore residence. The court said Olson was not a tenant; that he had no possessions at the duplex except for a change of clothes; and that he slept on the floor. This ruling ignores, however, the fact that Olson had permission to stay at 2406 Fillmore for some indefinite period, and that LouAnn Bergstrom testified Olson had the right to allow or refuse visitors' entry.

(J.A. 21).

Petitioner continues to question the validity of the Minnesota Supreme Court's conclusion (Petitioner's Brief, p.

[12] Respondent concedes this right was not unqualified. In essence, the Bergstrom's granted this authority to Respondent as a right attendant to his indeterminate occupancy of the premises. That privilege, obviously, remained subject to his host family's primary possessory claim.



16), see also Solicitor General's Brief, p. 18). The parties' testimony, however, reinforces the Minnesota Supreme Court's determination that Olson possessed a societally recognized privacy right in the dwelling where he was arrested. Mr. Olson testified that he had no other address, that he was given permission to stay at the premises for an indefinite period by the tenants, he had no intention of departing, and he received friends and visitors at that address and would instruct them to meet him at this particular dwelling. (RHT. 217-218). LouAnn Bergstrom testified that Respondent could admit or deny visitors' entry (RHT. 192). Julie Bergstrom testified that Mr. Olson initially asked her permission to stay at the residence. She stated that she agreed to his request and that he had permission to continue residing at her home for an indefinite period (T. 198).

Nonetheless, Petitioner contends that Respondent's connection with the dwelling is too tenuous to give rise to broadly recognized privacy expectations. Petitioner and the Amicus parties allege that Respondent must establish an ownership interest, a quasi property right, or evidence exclusive control of the dwelling before these privacy expectations can be legitimized (Petitioner's Brief, p. 20, Solicitor General's Brief, pp. 11, 19).

Although the factors mentioned by Petitioner are relevant to an inquiry into the validity of Respondent's privacy expectation, they are not, obviously, wholly determinative. *Rawlings* v. *Kentucky*, 448 U.S. 98, 105 (1980). Neither an ownership interest nor exclusive dominion over a given area is a prerequisite for "standing" under the Fourth Amendment. *Katz* v. *United States*, 389 U.S. at 353. See also *Warden* v. *Hayden*, 387 U.S. 294 (1966).

This Court has explicitly held that an individual may have a privacy expectation even while present as an

authorized guest in another's dwelling. *Jones* v. *United States*, 362 U.S. 257, 265-266 (1960). The *Jones* decision determined that "anyone legitimately on the premises where a search occurs may challenge its legality . . ." Id at 267. In *Rakas* v. *Illinois*, the Court narrowed its prior holding in *Jones*. Justice Rehnquist, in his opinion, was however, careful to note:

> We do not question that conclusion in *Jones* that the defendant in that case suffered a violation of his personal Fourth Amendment rights if the search in question was unlawful . . . We think that *Jones* on its facts merely stands for the unremarkable proposition that *a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable government intrusion into that place.* (Emphasis supplied).

439 U.S. 128, 142-143 (1978).

The Minnesota Supreme Court's February 24, 1989 decision plainly and straightforwardly applied the guidelines set forth in this Court's decisions in *Jones* and *Rakas*. The Minnesota Supreme Court construed *Rakas* as rejecting "the notion that anyone legitimately in a dwelling automatically has standing to challenge an illegal search . . ." but added ". . . this did not mean that a guest never has standing . . ." and "although the *Rakas* Court subsequently qualified the rationale of *Jones*, it explicitly reaffirmed the factual holding in that case . . ." (J.A. 21). Because the Minnesota Supreme Court found the factual setting between this action and Jones "quite similar" it reasonably concluded that Mr. Olson possessed a legitimate expectation of privacy in the dwelling at 2406 Fillmore.



### D. The Minnesota Supreme Court Properly Applied Prior Decisions Of This Court In Concluding That Respondent's Personal Fourth Amendment Rights Were Violated By His Warrantless Arrest.

#### 1. Respondent's Assertion Of His Fourth Amendment Right To Be Free From Unreasonable Search And Seizure Is Not Dependent Upon The Existence Of A Property Interest In His Temporary Dwelling.

Petitioner emphasizes Respondent's lack of a proprietary interest in the premises at 2406 Fillmore as proof that he did not possess a reasonable expectation of privacy in that dwelling. Similarly, the Solicitor General argues that a person who does not have a "recognized legal interest property" or an interest which "enjoys the distinguishing feature and chief quality of . . . property rights . . ." cannot invoke the safeguards contained in the Fourth Amendment. (Solicitor General's Brief, p. 11).

This characterization broadly misstates the focus of this Court's earlier decisions. Admittedly, a footnote in *Rakas* contains this Court's comment:

> Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law. . .

439 U.S. at 143, n. 12. However, that footnote goes on to add:

> Expectations of privacy protected by the Fourth Amendment, of course, need not be based on a common law interest in real or personal property or on the invasion of such an interest. These ideas were rejected both in *Jones* . . . and *Katz*. . .

Id. at 143, n. 12.

Indeed, in *Rakas* this Court was careful to emphasize:

> . . . We adhere to the view expressed in *Jones* and echoed in later cases that arcane distinctions developed between property and tort law, between guests, licensees, invitees and the like, ought not to control. . .

Id. at 143.

The course set by this Court in *Jones*, *Katz*, and *Rakas* is consistent with the historical context underlying creation of the Fourth Amendment. The Solicitor General contends: "the first clause of the Fourth Amendment makes clear that the amendment focus principally on the protection of interest in property." (Solicitor General's Brief, p. 10). From this it argues that recognized property rights or privileges inherently tied to property ownership are prerequisites to valid privacy expectations. This statement grievously misstates the historical context underpinning creation of the Fourth Amendment. The Fourth Amendment was not so much a desire to protect property interests as an effort to extinguish general warrants.

Since organized local police forces were not created until approximately 1844, the framers of the Constitution simply did not envision a warrantless search or arrest. Prior to the enactment of the Constitution *all* arrests, wherever accomplished, required a warrant of some type. The purpose of the Fourth Amendment is simply to assure that any warrant issued be based on probable cause. As one commentator noted:

> . . . The searches with which the founding fathers were familiar were searches conducted by private citizens. These searches required a writ of some sort. Consequently, a warrantless search, reasonable or otherwise, would not have been in the contemplation of the drafters of the Fourth Amendment. It appears, then, that the prohibition against unreasonable searches is coextensive with the prohibition against



> unsupported warrants for it is unlikely that the drafters envisioned a search which could be both reasonable and without a warrant. . .
>
> Given the historical period which was the context for a national revolution and the spirit in which the Fourth Amendment was drafted, the Fourth Amendment to the Constitution did not admit of the possibility of arrest or search *without* a warrant. (Emphasis in original).

Grayson, *The Warrant Clause in Historical Context*, 14 Am. J. Crim. Law, 107, 114 (1987). This historical context was apparently accepted by Justice Jackson in *Harris* v. *United States*, 331 U.S. 145, 196 (1946), (dissenting).[13]

By diverting focus from mechanistic property concepts as a focal point for Fourth Amendment analysis, this Court has, in fact, reinvigorated the framers' original intent. The simple fact that Respondent's control over the premises was limited, or shared with others, does not necessarily forestall invocation of his Fourth Amendment rights. In *Recznik* v. *City of Lorain*, this Court held that privacy expectations are not waived merely because a number of people gather together in a private residence. 393 U.S. 166, 169 (1968) (per Curiam). Indeed, many encounters with police authorities are made in shared surroundings. As one commentator noted ". . . where the claimant is part of a sufficiently small and intimate group that shares a place [he or] she has an expectation of privacy there that should be recognized." Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 Calif. L. Rev. at 1618.

Moreover, this is fully consistent with recent decisions of this Court. Petitioners and the Amicus parties all claim

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[13] This historical context is not universally accepted as Justice Stevens explained in *Payton* v. *New York*, 445 U.S. at 592-598.

that Respondent cannot claim legitimate expectation of privacy if he does not have complete control and dominion over the premises coupled with the right to exclude *all* others from the dwelling. (See Petitioner's Brief, p. 17, Solicitor General's Brief, p. 19, Amicus Brief, p. 7). From a common sense prospective, this notion is nonsensical. It would, if literally applied, emasculate the Fourth Amendment. Virtually no one has untrammelled authority to exclude unwanted or undesired guests. Tenants in common and joint tenants must comply with one another's wishes. Roommates must acquiesce to the entry of their companion's guests, no matter how unwanted or undesirable. Certainly the fact that one chooses to live with others, and on occasion to be subordinate to their desires, does not mean that this individual forfeits any legitimate expectation of privacy in doing so. As this Court commended in *Katz* v. *United States:*

> . . .This effort to decide whether or not a given area viewed in the abstract is constitutionally protected reflects attention from the problem presented by this case. For the Fourth Amendment protects people not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection (citations omitted) but what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

389 U.S. at 351.

In *Rakas* this Court carefully drafted its opinion to preserve this concept. The State argues that *Rakas* affirmed the factual holding in *Jones* merely because "Jones had complete dominion and control over the apartment and could exclude others from it." Petitioner's Brief, p. 17, citing *Rakas*, 439 U.S. at 149). Somewhat disingenuously, the State chose to delete this Court's prefatory comment concerning the nature of Jones' control of the



premises. Justice Rehnquist characterized that authority as follows:

> *Except with respect to his friend*, Jones had complete dominion and control over the apartment and could exclude others from it (Emphasis supplied).

439 U.S. 128. Nothing in this Court's jurisprudence suggests that an individual must have absolute, or even primary control, over a given area before possessing a legitimate expectation of privacy in that place.[14] *Katz* v. *United States*, 389 U.S. at 351; *Rakas* v. *Illinois*, 439 U.S. at 149.

**2. The Minnesota Supreme Court's Decision Can Be Reversed Only If This Court Is Willing To Overturn *Jones* v. *United States*.**

The Minnesota Supreme Court explicitly based its decision on *Jones* v. *United States* (J. A. 21-22). Although this Court has narrowed its scope, that decision has never been overruled. Indeed, this Court was careful, in *Rakas* v. *Illinois*, to reaffirm the fact-based holding "that a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable government intrusion into that place." 439 U.S. at 142.

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[14] One commentator has noted that many Fourth Amendment claims are "secondary" or "derivative" in nature. For example, in family or communal settings, the actual owner or tenant of the property may be considered a primary right-holder. Others residing in the property may have no formal ownership or tenancy interest, yet hold societally recognized privacy expectations based on the grant of authority from a primary right-holder. In determining the scope of the Defendant's recognized privacy expectation, the Court must depend "on fairly concrete facts about the relationship." Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 Calif. L. Rev. at 1619-1620.

The circumstances of *Jones* v. *United States*, as recited by this Court, bear a striking similarity to the present case. In *Jones:*

> On direct examination [Defendant] testified that the apartment belonged to a friend, Evans, who had given him the use of it, and a key, with which the Petitioner had admitted himself on the day of the arrest. On cross examination Petitioner testified that he had a suit and shirt at the apartment, that his home was elsewhere, that he paid nothing for the use of the apartment, that Evans had let him use it as a friend, that he slept there maybe a night and that at the time of the search Evans had been away in Philadelphia for about five days.

362 U.S. at 259.

Petitioner labors mightily, yet fruitlessly, to distinguish *Jones*. The only distinguishing characteristic cited by the State is that *Jones*, in contrast to Olson, possessed a key to the dwelling. Possession of a key, while certainly a factor in *Jones* is, in no fashion, crucial to its holding.[15] Suggesting that a guest in a dwelling possesses a reasonable expectation of privacy only if he or she has a key and control of the premises once again supplants

[15] Possession of a key was apparently only one factor considered by this Court in *Jones*. See *Jones* v. *United States*, 362 U.S. at 295, *Rakas* v. *Illinois*, 439 U.S. at 141. This is hardly surprising. The author of this brief employs a cleaning person who possesses keys to my dwelling. This individual is present but for a few hours each month. She receives no guests, telephone calls or messages at this address. She does not sleep there nor consume meals on the premises. Since she cleans the home alone during the work day, she also has "exclusive dominion" over the dwelling. Incredibly, under the State's analytical framework, this cleaning person may have a greater expectation of privacy than Respondent simply because she has a key to the premises. Giving possession of a key the primacy advocated by the State is simply nonsensical.



privacy expectations with mechanistic concepts. Yet Petitioner explicitly asks this Court to strip away Respondent's subjective privacy expectations merely because he did not have a key to the premises.

The factual similarity between *Jones* and this case are striking. Jones occupied the apartment of his friend after first obtaining consent. Olson occupied his friends' home with their consent (RHT. 182, 198) Jones had stayed at his friend's apartment "maybe a night". Olson stayed at the Bergstrom home for one to two days (RHT.216-218). Neither Olson nor Jones paid rent. Both Olson and Jones possessed clothes at their temporary dwelling but certainly not a full wardrobe (RHT. 220). While Olson professed his continuing intention to reside at the Bergstrom home for an indeterminate period, the record in *Jones* is silent regarding the planned duration of Jones' stay. Given his synergy the Minnesota Supreme Court had little choice but to follow *Jones* and grant Respondent "standing". Only by overturning that decision can this Court accomplish the end sought by Petitioner. In the past this Court has been loath to employ this extreme measure. *Welch* v. *Texas Department of Highways*, ___ U.S. ___, 107 S. Ct. 2941, 2948 (1987), *Thomas* v. *Washington Gas Light Company*, 448 U.S. 261, 272-273 (1980).

### 3. This Court Should Not Overrule *Jones* v. *United States* And Adopt The Artificial And Mechanistic Test Proposed By Petitioner.

Petitioner advocates this Court adopt a twelve-part test to determine whether a criminal defendant's subjective privacy expectation is one recognized by society (Petitioner's Brief, p. 21). The Amicus parties aligned with prosecuting authorities suggest a similar test (Ami-

cus Brief, p. 6).[16] Certainly some of the factors outlined by Petitioner relate to a criminal defendant's objective privacy expectation. For example, if the visitor had taken precautions to develop and maintain his privacy in the dwelling, that evidence is a subjective expectation of privacy. Similarly, if the visitor has some right to exclude others from the home, that right gives objective validity to the guest's subjective expectation.

However, the majority of the concerns outlined in Petitioner's formula have little to do with privacy notions.[17]

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[16] Interestingly, Petitioner argues that the much more streamlined *Dorman* guideposts are "impractical, inflexible and outdated" (Petitioner's Brief, p. 29). However, the State has no hesitancy in advocating adoption of its multi-faceted and mechanistic framework to gauge privacy expectations. The intrinsic inconsistency in the State's position is painfully clear. Apparently the State views the *Dorman* test as overly restrictive because it limits police authority to invade private areas. Accordingly, it wants to do away with *Dorman*. Similarly, Petitioner advocates imposition of a Byzantine and mechanical approach to "standing" because it believes this tactic will limit the number of persons able to raise Fourth Amendment challenges to a warrantless seizure.

[17] For example, Petitioner suggests that a visitor related by blood or marriage has a greater expectation of privacy than a non-relative guest. This supposition is questionable. A person present at the home of a distant relative for a brief time presumably has a lesser expectation of privacy than one present at the home of his best friend. Other "relevant factors" seem to be included for the singular purpose of limiting the number of Defendants able to raise Fourth Amendment claims. Petitioner suggests that a person receiving mail at the dwelling or having his name on the door possesses a greater expectation of privacy than an individual receiving his mail at a local post office. This factor will almost always weigh against a grant of "standing". Generally, persons receiving their mail at a particular address, or having their name posted on the door, assume permanent residence. Virtually all the remaining criteria the State seeks to employ concern attributes uniquely attributable to either owners or principal tenants. These criteria are unlikely to favor guests of any duration.



The factors listed by Petitioner are little more than a catalogue of many of mechanistic criteria. Many of Petitioner's considerations have been explicitly rejected by this Court as pertinent factors in determining an individual's legitimate privacy expectations. In particular, Petitioner advocates the Court consider an individual's property interest in the premises, receipt of mail, contribution to maintenance, and volume of clothing and other possessions present as applicable gauges. Presumably, the State believes these factors all weigh against Respondent. They also weighed against Jones. Yet, this Court explicitly affirmed Jones' right to contest a seizure at his friend's apartment, where he did not receive mail, where he had slept but a night, and at which he had but a single change of clothing. 362 U.S. at 265. Viewed in this light, Petitioner's analytical framework is best examined as a hidden attack on *Jones* v. *United States*. The purpose of this test is, by subterfuge, to strip away the remaining validity of this Court's earlier decision.

Petitioner hopes to accomplish this goal by replacing the analytical constructs of *Jones*, *Katz*, and *Rakas* with its mechanistic "checklist". In doing so, it directly challenges the rationale underpinning those decisions. In particular, Chief Justice Rehnquist noted:

> . . . capacity to claim the protection of the Fourth Amendment depends not on a property right in the invaded place but upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded place (citations omitted). Viewed in this manner, the holding in *Jones* can best be explained by the fact that Jones had a legitimate expectation of privacy in the premises he was using and therefore can claim the protection of the Fourth Amendment with respect to government invasion of those premises, even though his interest in those premises might not have been a recognized property interest as common law.

*Rakas* v. *Illinois*, 439 U.S. at 143. Similarly, in *Jones* v. *United States*, this Court declared:

> We are persuaded that it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions developed and refined by the common law in evolving the body of private property law which more than almost any other branch of law has been shaped by distinctions whose validity is largely historical . . . distinctions such as those between "lessee", "licensee", "invitee" and "guest" often only of gossamer strength ought not to be determinative in factioning procedures ultimately referable to constitutional safeguards.

362 U.S. at 265-266. Yet, that is precisely what the State suggests this Court do through the use of its twelve-part test.

Most importantly, this Court should categorically reject Petitioner's "checklist" concept because it is of marginal utility. This Court has emphasized that any guideposts intended to govern police behavior in search and seizure decisions must be workable for application by rank and file police officers. *Illinois* v. *Andreas*, 463 U.S. 765, 772 (1983). *New York* v. *Belton*, 453 U.S. 454, 458-460 (1981), *United States* v. *Ross*, 456 U.S. 798, 821 (1982). The multi-prong analysis advocated by Petitioner is, by contrast, byzantine, unfocused, and confusing. Many of the criteria advocated by the State, such as property rights, receipt of mail, possession of a key, contribution to household maintenance, and volume of goods or possessions present, will simply not be known to police officers who must make an immediate decision. Moreover, Petitioner's formula makes no effort to identify which criteria are more or less important than others. Consequently, police officers on the scene will receive little illumination or instruction from this checklist.



**4. Privacy Expectations Must Generally Be Determined On A Case-By-Case Basis But, If This Court Believes Lower Courts Need Guidance In Making These Decisions Superior Alternative Criteria For Petitioner's Proposed Test Are Available.**

The State asserts that this Court has failed to "set forth the factors which would help establish a legitimate expectation of privacy . . ." and that lower Courts . . . without guidance from this Court have reached inconsistent and sometimes incongruous results" (Petitioner's Brief, p. 20). In *Rakas* this Court recognized that privacy expectations must, of necessity, be analyzed on a case-by-case basis and consequently rejected a "bright line" rule. 439 U.S. at 144-148.[18] That determination is still valid. Because a Court in one jurisdiction suppresses evidence while another refuses to do so does not mean that the state of jurisprudence is a mine field of confusion. It merely means that lower Courts have accepted this Court's admonition to make suppression decisions on a case-by-case basis.

This does not imply that lower Courts apply vastly differing tests or standards to make that determination.

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[18] Indeed, in *Rakas*, this Court noted that there will always "be fine lines to be drawn in Fourth Amendment cases as in other areas of law . . ." and explicitly determined that "standing" determinations require individual analysis. 439 U.S. at 147. The "legitimately on the premises" standard enunciated in *Jones* v. *United States* was far more clear than the circuitous analytical framework proposed by Petitioner. Yet this Court rejected that more clearly articulated guide as "a phrase which at most has superficial clarity and which conceals underneath that thin veneer all of the problems of line drawing which must be faced in any conscientious effort to apply the Fourth Amendment." Id at 147. If this Court now wishes to reverse the path laid down in *Rakas* and supplant a "bright line" standard for individualized application of legitimized privacy expectation, then the "legitimately on the premises" test, however flawed, offers greater instruction to police officers.

Indeed, there is no doubt that lower Courts have readily adopted the general standard that an individual can raise a Fourth Amendment seizure challenge only when he or she has a legitimate expectation of privacy in a given case. See *United States* v. *Aguirre*, 839 F. 2d 854 (1st Cir. 1988), *United States* v. *Echegoyen*, 799 F. 2d 1271 (9th Cir. 1986), *United States* v. *Pollock*, 726 F. 2d 1456 (9th Cir. 1984), *State* v. *Reddick*, 207 Conn. 323, 541 A. 2d 1209 (1988). *People* v. *Smith*, 420 Mich. 1, 360 N.W.2d 841 (1984). In applying the general principal, lower Courts have used remarkably similar criteria. Trial Courts consider a guest's legitimate presence at the scene, the extent of the accused's actual use or occupancy of the premises, right to exclude others, the defendant's subjective expectation of privacy in the area, the nature and degree of the accused's freedom to utilize the property, and his relationship with the actual owner or tenant. See *United States* v. *McIntosh*, 845 F. 2d 466 (8th Cir. 1988), *United States* v. *Sangineto Miranda*, 859 F. 2d 1501 (6th Cir. 1988).

Standing alone, this framework certainly seems workable. However, if lower Courts need additional guidance, Respondent suggests this Court instruct them to apply the following criteria:

(1) Is the guest legitimately present at the scene?

(2) Has the accused been granted authority over the premises greater than that normally possessed by a casual visitor? For example, does the accused have any limited right to exclude unwanted intruders from the dwelling?

(3) Is there a fixed duration to the guest's stay? If so, what is the duration of his or her presence?

(4) Does the suspect have freedom to utilize the property or has he stayed there in the past? What is his relationship with the actual owner or tenant?



These factors are far more flexible than the mechanistic "checklist" concept advocated by Petitioner and also offer both lower Courts and police officers in the field guidelines more closely tied to expectations of privacy.

### C. The Foundational Principles Underlying The Exclusionary Rule Support The Minnesota Supreme Court's Decision.

The Minnesota Supreme Court's unanimous opinion mandated suppression of evidence obtained as a result of Respondent's warrantless arrest. In urging this Court to strip away Mr. Olson's right to claim the protections granted by the Fourth Amendment, Petitioner again reminds this Court of the social cost attendant to the exclusionary rule—withholding evidence from the ultimate trier of fact (Petitioner's Brief, p. 14).

This is certainly a valid concern and should not be minimized. However, Petitioner's concentration on this issue conveniently overlooks the intertwined principles underlying the exclusionary rule.[19] Those precepts mandate its application here and favor the Minnesota Supreme Court's grant of "standing" to Respondent.

First, the exclusionary rule deters police misconduct by preventing the government from using the fruits of its illegal conduct against the person whose rights it violated. *Weeks* v. *United States*, 232 U.S. 383 (1914), *Mapp* v. *Ohio*, 367 U.S. 643 *Wong Sun* v. *United States*, 371 U.S. 471 (1963). Obviously, the Minnesota Supreme Court's

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[19] As this Court acknowledged in *United States* v. *Leon*, concern over the impact of the exclusionary rule pertains to the "absolute" number of defendants released because of police illegality. The study cited by this Court in *Leon* suggests that an insubstantial percentage of arrestees are freed due to the invocation of the exclusionary rule. 468 U.S. 897, 907, n 6 (1982).

decision will reacquaint Minneapolis police officials with the commands of the Fourth Amendment. It will also effectively remind them of the penalty the prosecution and society must pay when the police refuse to heed its dictates.

Second, use of the exclusionary rule preserves judicial integrity in the criminal prosecution process. As this Court first explained in *Mapp* v. *Ohio:*

> . . . There is another consideration—the imperative of judicial integrity. The criminal goes free if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws or worse, its disregard of the charter of its own existence.

367 U.S. at 659.

The character of the police attack on Mr. Olson's temporary sanctuary lends paramount attention to this concern. Relying on uncorroborated and uninvestigated information from a fictitious informant, police directed Respondent's arrest. They did so without bothering to even attempt securing an arrest warrant. Officer DeConcini testified at the pretrial suppression hearing that he had never attempted to obtain an arrest warrant during the weekend (RHT. 130) and added that one consideration underpinning his refusal to do so was his reluctance to disturb local prosecutors on Saturday or Sunday (RHT. 116). The Minnesota Supreme Court's decision properly emphasized to police officers that they should be equally sensitive to the liberty interests of citizens. It also preserved judicial rectitude.

Reversing the Minnesota Supreme Court will, in effect, make the judiciary a motivating force sanctioning police



misconduct.[20] Justice Stevens recently highlighted this concern, commenting:

> It is, or course, true that the exclusionary rule exerts a high price—the loss of probative evidence of guilt. But that price is one the Courts have often been required to pay to serve important social goals. That price is also one the Fourth Amendment requires us to pay, assuming as we must that the framers intended that its strictures "should not be violated". For all such cases, as Justice Stewart has observed "the same extremely relevant evidence would have been obtained had the police officer complied with the commands of the Fourth Amendment in the first place. (Citation omitted)

*United States* v. *Leon*, 468 U.S. at 979 (Stevens, J., dissenting, and concurring in *Massachusetts* v. *Shepard*, 468 U.S. 981 (1982).

### II. Respondent's Warrantless Arrest Was Not Justified By Exigent Circumstances.

Petitioner contends that, even if Respondent possessed a legitimate expectation of privacy in the dwelling where he was arrested an urgent need sanctioned his war-

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[20] On occasion this Court has suggested that suppression of evidence, in certain instances, may not be an appropriate vehicle to remedy of unlawful police conduct. For example, it can be argued that even if the prosecution were allowed to use the evidence obtained by Mr. Olson's arrest, that civil litigation can prove illegality. This argument, while facially convincing, reflects abstract notions and ignores practical reality. Juries are unlikely to punish officers for seeking out criminal suspects. Moreover, a series of procedural and substantive defenses have been engrafted onto civil rights claims. See *Malley* v. *Briggs*, 475 U.S. 335 (1986), *Davis* v. *Scherer*, 468 U.S. 183 (1984), *Graham* v. *Connor*, ____ U.S. ____, 104 L. Ed. 2d 1443 (1989). The net effect is to make civil recovery extraordinarily speculative, conjectural and burdensomely expensive.

rantless arrest. That claim was rejected by the Minnesota Supreme Court, which commented:

> While it is true that a grave crime was involved, it is also true that the suspect was known not to be the murderer, but thought to be the driver of the getaway car. Probable cause to believe the suspect was the driver depended, as we have seen, in large part on the reliability of an unknown informant. The police had already recovered the murder weapon. The suspect had not left town by bus, at least not yet, as the telephone tip had indicated, but had returned to the duplex where he had stayed the previous night. The police knew that LouAnn and Julie [Bergstrom] were with the suspect in the upstairs duplex with no suggestion of danger to them. . .
>
> We do not think the particular circumstances of this case amount to exigent circumstances. It was evident the suspect was going nowhere. If he came out of the house he would have been promptly apprehended. . .

The Minnesota Supreme Court added:

> At least by 2:00 P.M. the police had made plans for Olson's arrest at the dwelling where he was staying at such time as Olson might return. Nevertheless, in the hour that elapsed before any arrest could be made at the duplex, no effort was made to obtain an arrest warrant to enter the dwelling. We do not know if a warrant could have been obtained within that hour or within a relatively short time thereafter; on the other hand, the State has not suggested that a warrant could not have been obtained. We do know that a search warrant was obtained on Saturday, the day before, in two and one-half hours when the urgency to search an already impounded car was much less.

(J.A. 23-25). Given this scenario, the Minnesota Supreme Court concluded that Respondent's Fourth Amendment



rights were violated by his warrantless arrest. That determination should be affirmed.

### A. Warrantless Arrests In Private Residences Are Presumptively Unlawful.

This Court has unequivocally held:

> In terms that apply equally to seizures of property and seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

*Payton* v. *New York*, 445 U.S. 573, 590 (1980). Accordingly, Respondent's warrantless arrest inside a dwelling is presumptively unlawful. *Welsh* v. *Wisconsin*, 466 U.S. 740 (1984). Petitioner has the responsibility of establishing that Respondent's arrest falls within one of the narrowly defined exceptions to this constitutional prohibition. In weighing that obligation, this Court has specifically declared that "police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or seizures." Id at 749-750.

### B. Petitioner Has Failed To Meet Its Burden Of Demonstrating Any Exigency Justifying The Police Storming Of Respondent's Temporary Residence.

In this action the prosecution has sorely failed to voice any exigent condition which may sanction Mr. Olson's warrantless arrest. The emergency circumstances necessary to justify a warrantless arrest are generally those which gravely endanger the lives of the public or police officers. *United States* v. *Jones*, 635 F. 2d 1357 (8th Cir. 1980). This does not mean simply that a violent or dangerous crime has occurred. This Court has never comprehensively discussed the various emergency circumstances sanctioning a warrantless arrest. A number of

this Court's decisions make it plain that exigencies arise only in a handful of narrowly tailored instances. For example, hot pursuit of a fleeing felon, *United States* v. *Santana*, 427 U.S. 38 (1976); destruction of evidence, *Warden* v. *Hayden*, 387 U.S. 294, gunplay or danger of gunplay, *Michigan* v. *Tyler*, 436 U.S. 99 (1978).

**1. Petitioner Has Not Explained Why Police Authorities Could Not Promptly Secure A Warrant For Respondent's Arrest Nor Any Public Danger Caused By Delaying Respondent's Arrest Until A Warrant Could Be Secured.**

Petitioner has not yet explained why Detective DeConcini could not obtain a warrant for Respondent's arrest. Petitioner claims that obtaining an arrest warrant "takes substantial time" because the warrant "must be combined with a criminal complaint which requires the signature and approval of both the County Attorney and a Judge." The procedure is not nearly so burdensome as Petitioner leads this Court to believe. The "complaint" referred to by the prosecution is in fact compiled on a standardized form mandated by Minnesota Rule of Criminal Procedure 2.03. These complaints need not be extraordinarily lengthy. They must simply contain "sworn testimony that there is probable cause to believe that an offense has been committed and that the defendant committed it . . ." Minnesota Rule of Criminal Procedure 3.01. Indeed, the initial complaint filed against Respondent was less than four pages in length. The arrest warrant process, under Minnesota law, is virtually identical to the procedure involved in obtaining a search warrant. See *State* v. *Merrill*, 274 N.W. 2d 99 (Minn. 1987), *State* v. *LeBarre*, 292 Minn. 228, 295 N.W. 2d 435 (1972). On Saturday, police were able to secure a search warrant for a vehicle involved in their investigation within two and one-half hours. As yet, police authorities have been unable to adequately



explain why procuring an arrest warrant one day later was more difficult.

Detective DeConcini was scarcely in a position to explain why an arrest warrant could not be procured, since he had never before sought one during a weekend. Nonetheless, the Petitioner's Brief blithely contends "it is clear a warrant could not have been obtained quickly . . ." In fact, Detective DeConcini testified, on cross examination:

Q. Officer, I assume in the course of your 20 years as a police officer you have secured arrest warrants and arrested individuals based on warrants. Is that correct?

A. Yes, I have.

Q. Are you aware that when this process is followed that a Judge actually has to physically review the warrant and determine if it is proper to arrest somebody. Is that correct?

A. That is correct.

Q. And approximately how long—if there is some urgency involved the process can be expedited, can't it?

A. Yes and no.

Q. Well, you could secure one within a couple of hours, under normal circumstances, couldn't you?

A. Under normal circumstances, Monday through Friday from 8:00 a.m. to 4:00 p.m., yes.

Q. Have you ever secured an arrest warrant on a weekend?

A. No.

Q. Have you ever tried?

A. No.

(RHT. 129-130).

Detective DeConcini never indicated at any point in his testimony that the time required to obtain an arrest warrant entered into his decision. The only distinction between arrest and search warrants in Minnesota appears to be the County Attorney's active participation in the warrant application process. Detective DeConcini explained that he did not wish to disturb prosecutors during their vacation time. These excuses were, understandably not warmly received by the Minnesota Supreme Court. They should be similarly rebuffed by this tribunal.

Petitioner is unable to identify any danger to the public prevented by Respondent's warrantless arrest. Although Petitioner desperately attempts to persuade this Court that some urgent need justified Respondent's warrantless arrest those efforts have a singularly hollow cast.

First, the State notes the gravity of the offense involved as sanction for Respondent's warrantless arrest. (Petitioner's Brief, p. 26). The seriousness of the charge against Respondent is not disputed. However, while the gravity of a particular offense may be an underlying consideration, *Welsh* v. *Wisconsin*, 466 U.S. at 753, the seriousness of a particular crime does not alone create an exigency. In *Payton* v. *New York*, this Court deemed the accused's arrest "routine", notwithstanding the equally serious nature of the charges leveled against Payton. 445 U.S. at 583.

Second, Petitioner argues "Police had reason to believe Respondent might be armed . . ." (Petitioner's Brief, p. 26). This conjectural supposition is without basis. The murder weapon was recovered shortly after the robbery. When Mr. Olson fled he was observed to be unarmed.



Even the fictitious tipster did not allege that Mr. Olson possessed a firearm. Not surprisingly, at the time of his arrest, Respondent was unarmed. The State casually dismisses this troubling information as unimportant. (Petitioner's Brief, p. 26).

Third, the State argues that "police had reason to believe Respondent may be preparing to flee . . ." Again, this is a demonstratively meritless conclusion. It is underpinned by two extraordinarily weak pillars. Initially the State argues that police concluded Respondent intended to flee because they had "received information that he might flee . . ." (Petitioner's Brief, p. 27). This information came from Detective DeConcini's fictitious tipster. As the Minnesota Supreme Court noted, this information proved unfounded even before Respondent's arrest. Respondent had not left town but "had returned to the duplex where he had stayed the previous night." (J.A. 23).

The Petitioner also contends police reasonably believed Respondent would attempt escape because "Respondent's statement to Julie Bergstrom "tell them I left" could be reasonably construed . . . as a statement of . . . present intent to flee . . ." (Petitioner's Brief, p. 27). Unfortunately, there is no evidence that Respondent ever instructed Julie Bergstrom to mislead police regarding his location.[21] Julie Bergstrom expressly denied hearing

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[21] Julie Bergstrom, the individual at the other end of the telephone line, contradicted Detective DeConcini's version of the telephone conversation in which the detective asserts hearing the male background voice. Ms. Bergstrom testified:

Q. Did you have a telephone conversation with Sgt. DeConcini?
A. I did have a conversation with an officer that day *after the police were already in my house*(emphasis supplied).
Q. Did he instruct you or ask you to send Rob Olson outside?
A. Yes.
Q. Did you tell Mr. Olson that?
A. No . . . I don't even know where he was at the time . . . when the police came in I had no idea where he was (T. 543)

Respondent make any such statement (T. 543). Ms. Bergstrom added that the telephone call from Detective DeConcini occurred only after police entered the home to arrest Mr. Olson and that she was unaware of Respondent's location at the time (T. 543). Even Detective DeConcini acknowledged that he could not identify the voice he assertedly overheard (T. 434). Even if true, there is no judicial authority for the proposition that a criminal suspect's unwillingness to voluntarily surrender himself to police constitutes an exigent circumstance. The Minnesota Supreme Court specifically dealt with this concern in its opinion noting "three or four Minneapolis police cars surrounded the house." The Court then added, "It was evident the suspect was going nowhere. If he came out of the house he would have been promptly apprehended." (J.A. 23-24).

**2. The *Dorman* Analysis Is An Appropriate Starting Point To Comprehensively Articulate The Factors Which Bear Upon The Existence Of Exigent Circumstances And The Minnesota Supreme Court Fairly Concluded No Exigency Existed Under The *Dorman* Standards.**

In *Dorman* v. *United States*, 435 F2d 385 (D. C. Cir. 1970) (en banc) Circuit Judge Leventhal attempted to substantively analyze the factors pertinent to the exigent circumstances issue. The Court outlined six considerations: (1) the gravity of the offense, (2) whether the suspect is reasonably believed armed, (3) whether "there exists not merely the minimum of probable cause . . . but beyond that a clear showing of probable cause, including reasonably trustworthy information to believe that the suspect committed the crime . . .", (4) whether the police have strong reason to believe the suspect is in the premises about to be entered, (5) likelihood of escape, (6) forcefulness involved in the entry. Id. at 392-393.



In *Welsh* v. *Wisconsin*, this Court characterized *Dorman* as "a leading federal case defining exigent circumstances" but declined to express approval of "all the factors included in the standard." 466 U.S. at 751. All parties acknowledge that *Dorman* has been widely followed (see Solicitor General's Brief, p. 21, n. 11). However, Petitioner argues that the *Dorman* analysis is "impractical, inflexible and outdated." (Petitioner's Brief, p. 29).

Presumably, the prosecution's objection to the *Dorman* analysis is that its considerations generally support the Minnesota Supreme Court's determination. Admittedly, police sought Respondent for a serious offense. However, police had no valid reason to believe Respondent was armed, the evidence underpinning the police probable cause determination came from uncorroborated and uninvestigated information provided by a fictitious tipster, there was no conceivable likelihood Respondent would flee, and the police entry into the home at 2406 Fillmore was accomplished in a threatening and offensive manner. (RHT. 184-185, 198. For a detailed explanation see Respondent's Brief in Opposition, p. 15 n. 13.)

It is not certain that additional instruction is required from this Court to guide lower Courts in making similar determinations. However, if this Court chooses to adopt a more comprehensive series of standards than previously articulated, Respondent suggests that the *Dorman* factors, with some modification, present an appropriate starting point. Respondent submits that the following constitute appropriate criteria: (1) gravity of the offense involved, (2) whether police have a reasonable belief that a suspect is armed and presents an immediate danger to the community, (3) whether the police possess, at the time they choose to make an arrest without judicial guidance, a clear showing of probable cause based on reasonably trustworthy information, (4) whether there is a reason-

able likelihood the suspect will successfully flee if not swiftly apprehended, (5) were the police, in the absence of an arrest warrant, required to use force to effect the suspect's arrest.[22]

### C. Petitioner's Attempt To Redefine Exigent Circumstances Will, In Application, Bring Virtually Any Felony Arrest Within Its Parameters And Emasculate *Payton* v. *New York*.

Petitioner proposes the *Dorman* analysis be recast by this Court to warrant "a finding of exigency where police have probable cause,[23] knowledge of the suspect's whereabouts, and facts indicating the suspect is dangerous and about to flee" (Petitioner's Brief, p. 31). This characterization effectively strips away much of the protection assured under *Payton*. Both *Payton* and *Olson* were suspects in murder investigations. Moreover, the suspect in *Payton* was believed to have actually committed the murder, the weapon had not been recovered, and police reasonably believed Payton to be present when his arrest was sought.

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[22] Certainly if the police can point to an emergency condition already explicitly recognized by this Court such as "hot pursuit" or possible destruction of evidence that warrantless arrest would be justified. These standards will be utilized only when police claim an urgent need to make an arrest in circumstances not universally recognized as "exigent".

[23] Respondent raised several issues on appeal to the Minnesota Supreme Court. Included in Respondent's appeal to the Minnesota Supreme Court was a challenge to the trial court's probable cause determination. Respondent also claimed his arrest was violative of both the United States and Minnesota Constitutions. The Minnesota Supreme Court did not determine the probable cause issue nor the validity of Respondent's arrest under the Minnesota Constitution. Accordingly, even if this Court reverses the Minnesota Supreme Court's February, 1989 decision, this action must be remanded to the Minnesota Supreme Court for determination of the remaining appeal issues raised by Respondent in that forum.



445 U.S. at 583. Payton's arrest, as Respondent's, was sought within a few days of the offense. Id at 576. Under these circumstances, this Court did not hesitate to characterize Payton's arrest for murder as "routine" and not involving any exigency. Id. at 583.

Yet, precisely the opposite result might occur if this Court redefines exigency as requested by Petitioner.[24] Using hindsight, police officers will be invited to find an emergency behind almost every felony arrest. Felony suspects, by definition, are believed to have committed serious offenses. Under Petitioner's expression of exigency, once police simply locate a felony suspect they are virtually guaranteed the right to make a warrantless arrest. All the police must prove is that the "suspect is dangerous and about to flee." Presumably, police will, as in this instance, bootstrap from the gravity of the offense to the conclusion that the suspect is dangerous. From there, police must only believe that the suspect is "about to flee".

Police will invariably conclude that a suspect is about to flee if, as Respondent, he refuses to voluntarily surrender himself to police in the absence of a warrant. (See Petitioner's Brief, p. 27). This standard strikes at the very heart of the Fourth Amendment. In *Payton*, this Court characterized the Fourth Amendment as "unequivocally"

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[24] Respondent submits that even if Petitioner's test is adopted Mr. Olson's arrest remains invalid. Although the crime involved was a grave one, the police have, as yet, been notably unable to articulate any reasonable basis to believe that Respondent was either dangerous to those around him or about to flee. *See* pages 35 through 38 *supra*. Certainly any danger to the public would not have been increased had police at least attempted to obtain judicial sanction for Respondent's arrest. Such approbation would have been particularly appropriate in light of the great uncertainty underlying Detective DeConcini's probable cause determination.

supporting the proposition that an individual may retreat into his dwelling and there be free from government seizure of his person unless accompanied by a warrant. 445 U.S. at 590. Yet Petitioner now asks the Court to emasculate that protection by finding, on the simplest pretext, that an exigency occurred. This will certainly do an injustice to Respondent. It will also create a rippling effect throughout this country's Courts as one tribunal after another is compelled to grant police virtually unfettered felony arrest authority under the nebulous standard enunciated by Petitioner.

In a feeble attempt to justify the storming of Respondent's temporary dwelling, Petitioner argues that the police invasion of the home was preferable to a stake-out which could have endangered the community. Petitioner cites a plethora of cases for the proposition that a "stake-out" is not required in preference to a warrantless arrest (Petitioner's Brief, p. 32). This argument might seem superficially compelling if viewed in isolation. The specific circumstances of Respondent's arrest, however, indicate that if any danger was posed it stemmed from the deliberate action of police authorities and not as a result of Respondent's conduct.

Petitioner's argument that a warrantless arrest is preferable to a lengthy stakeout is intrinsically flawed because it simply assumes that obtaining a warrant would have delayed Respondent's arrest. There is no evidence that this is true. Certainly police were able to obtain a search warrant in a brief time only twenty-four hours earlier. In this case, the Court has absolutely no idea how long procuring an arrest warrant would have taken to obtain, since police made no attempt to garner one. Officer DeConcini did testify that a warrant can be obtained within a few hours on a week day (RHT. 130). Officer VonLehe testified that he was sent to Respondent's temporary residence by Detective DeConcini at approximately 1:00 P.M. Sunday with instructions to arrest Mr. Olson (RHT. 142). Respondent was not present, he did not return to the house until a few hours later, and his arrest was not accomplished until approximately 3:00 P.M. Under these circumstances it is altogether possible that if police had made some degree of minimal effort that they might have procured an arrest warrant—or risked its denial—and effected Mr. Olson's arrest just as promptly.[25]



Petitioner and its Amicus colleagues suggest that a stake-out was inappropriate here and that an exigency occurs "whenever a suspect implicated in a violent crime or thought to be armed discovers he has been cornered by the police." Solicitor General's Brief, p. 24, Petitioner's Brief, p. 31, Amicus Brief, p. 24). This characterization ignores the crucial role played by police in contributing to

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[25] One commentator has suggested that Courts distinguish between "planned" and relatively spontaneous arrest decisions. 2 W. LaFave, *Search and Seizure*, Section 6.1(f) 600-602 (1987). Petitioner suggests that concept offers a means of distinguishing this action from *Payton* (petitioner's Brief, P. 35). This claim is without merit. The factual circumstances of *Payton* and this case are substantially similar. In *Payton*, police made their decision to arrest Payton "after two days of intensive investigation . . ." and attempted to do so at his residence within a few hours. 445 U.S. at 576. Here, police made their decision to arrest Olson after approximately one and one-half days investigation and chose to do so at his temporary residence. How Payton's arrest can be characterized as a "planned" arrest while Respondent's was "not truly a planned arrest" is puzzling. Petitioner suggests that Respondent's arrest was different than Payton's because Sgt. DeConcini would have arrested Respondent anywhere he found him (Petitioner's Brief, P. 35). Presumably, New York police would have arrested Mr. Payton anywhere they found him. The simple fact remains that both New York and Minneapolis police officers focused their arrest efforts at a dwelling.

the "exigency" purportedly justifying Respondent's arrest. Respondent had no personal knowledge that he was sought by police, nor was he aware that police intended to direct his arrest at the home at 2406 Fillmore. Although the chronology of events is disputed, Officer DeConcini testified that he alerted Respondent to police intentions by attempting to telephone him at the Bergstrom home and demanding his immediate surrender (T. 433-434).

Petitioner now contends that an exigency was thereby created because:

> Respondent, who knew he was involved in a robbery and murder and that the police were outside, may well have become desperate to escape. The stake-out would give him time to explore his options, including an armed shootout with the police or the taking of a hostage from within. A desperate Respondent may well have turned on his acquaintances. . ."

(Petitioner's Brief, p. 31).[26] Even assuming these concerns were valid, they were all prompted by deliberate police conduct. Rather than simply attempting to secure an arrest warrant and undertaking Mr. Olson's arrest with judicial approval, police chose to escalate the situation and then used Respondent's unwillingness to voluntarily surrender as an excuse for his warrantless seizure.

Prior decisions of this Court strongly imply that police should not be allowed to profit from the artificial creation

[26] The factual underpinnings for this conjecture are woefully inadequate. An escape would have been fruitless, since the house was surrounded. Certainly it would have been difficult for Mr. Olson to enter into a shoot-out with the police when he was unarmed. The occupants of the Bergstrom home did not feel threatened—he was their guest. Rather, their only hostages taken at the time of Mr. Olson's arrest were Julie Bergstrom and her mother, LouAnn, who were seized and mistreated by police officers (RHT. 184-200).



of exigent circumstances. This Court has held that failure to obtain a warrant when reasonable time and opportunity existed to do so invalidated a warrantless arrest even though the arrest was accompanied by an apparent exigency. *McDonald* v. *United States*, 335 U.S. 451, 454-456 (1948).[27] Similarly, Respondent submits that this Court should conclude that unless police can evidence, from the outset, that securing an arrest warrant will endanger the public, that police cannot then use their own subsequent actions creating an exigency, as a basis for dispensing with mandated warrant requirements.[28]

[27] Later this Court held that the test was not necessarily whether it was reasonable to procure a warrant, but whether, under the circumstances, the search and seizure were reasonable. *United States* v. *Rabinowitz*, 339 U.S. 56 (1950). Because the police had obtained a warrant for the suspect's arrest and because the search was made incident to that arrest, this Court sanctioned the seizure as reasonable even though police could have independently obtained a separate search warrant. In *Katz*, this Court noted that whenever a practicable police should obtain prior judicial approval of searches and seizures through the warrant process 389 U.S. at 357.

[28] At least one lower Court has concluded that a premature confrontation between a suspect and police can artificially create exigent circumstances that will not justify a warrantless search. *State* v. *Kelgard*, 40 Or. App. 205, 594 P. 2d 1271 (1979).

## CONCLUSION

The February, 1989 determination of the Minnesota Supreme Court is well-reasoned and consistent with the path of Fourth Amendment analysis directed by this Court. It should be affirmed.

Dated: 12/12/89

Respectfully submitted,

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FOR ARGUMENT



No. 88-1916

IN THE

# Supreme Court of the United States

October Term, 1989

STATE OF MINNESOTA,

*Petitioner,*

vs.

ROBERT DARREN OLSON,

*Respondent.*

ON WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

## REPLY BRIEF FOR PETITIONER

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---

## REPLY BRIEF FOR PETITIONER

---

This Reply Brief addresses only a few of the points of disagreement revealed by Respondent's Brief. An absence of discussion of a point in this Brief, therefore, does not signify agreement with Respondent; Petitioner relies on its opening Brief to contradict points not discussed in this Reply Brief.

## I. A CAREFUL ANALYSIS OF THE TOTALITY OF THE FACTS AND CIRCUMSTANCES DEMONSTRATES THAT RESPONDENT HAD NO REASONABLE EXPECTATION OF PRIVACY IN THE BERGSTROMS' DUPLEX; SUCH A CONCLUSION CAN BE REACHED WITHOUT OVERTURNING ANY PRIOR DECISIONS OF THIS COURT.

**1. Respondent's assertions about the illegal "police attack" on the duplex are not relevant to the "standing" issue before the Court.** Whether or not the police conduct in this case was outrageous pertains to the issue of the legality of the arrest and not to the "standing" issue. *See Rawlings v. Kentucky*, 448 U.S. 98, 112 (1980) (Blackmun, J., concurring) ("It remains possible for a defendant to prove that his legitimate interest of privacy was invaded, and yet fail to prove that the police acted illegally in doing so. And it is equally possible for a defendant to prove that the police acted illegally, and yet fail to prove that his own privacy interest was affected.").

**2. In arguing that the Bergstrom house was Respondent's residence within the meaning of the Fourth Amendment, Respondent makes several factual errors which, taken together, could mislead this Court if not corrected.**[1] First, Respondent did not have "changes of clothes" (Respondent's Brief, p.14) with him at the Bergstroms'; instead, he had at most one change of clothing (R.220). Moreover, it is possible that he did not obtain this clothing until the morning after his overnight stay, when he returned to Ecker's home several hours before his arrest (R.221). Second, Respondent did not receive guests at the Bergstroms' home (Respondent's Brief, p.15). In fact, Respondent did not want his whereabouts known; he admitted that aside from those living in the Bergstrom home, only one of his friends knew he was staying there (R.225-26). Third, Respondent's claim that he had no other place to stay (Respondent's Brief, p.15) ignores the fact that his home for at least ten days before the crime was at Ecker's apartment; presumably all of Respondent's possessions were still there (R.220-21). Fourth, although Respondent testified he intended to stay with the Bergstroms indefinitely, Julie Bergstrom testified that Respondent asked to stay only for "a couple days" (R.194-95). Fifth, Respondent stated he had permission to stay indefinitely; yet Louanne Bergstrom testified only that Respondent could stay until she asked him to leave (R.198). Finally, Respondent's statement that he was "temporarily residing" in the Bergstrom home (Respondent's Brief, p.9) conflicts, not only with the essential facts of the case (*see* Petitioner's Brief, pp.6-7, 16), but also conflicts with the understanding possessed by the owners of the home:

> Q. [by prosecutor]: Ms. Bergstrom, counsel just said that Mr. Olson was living there. Was he living there?
>
> A. [by LouAnne Bergstrom]: No, he wasn't living there. He stayed there one night.
>
> Q. So he was just a guest overnight?
>
> A. Right.

(R.189).

[1] Petitioner refers this Court to Petitioner's Brief, pp.6-7, 16 for a concise and accurate statement of the relevant facts.

**3. Respondent's Brief, largely a refutation of arguments which Petitioner did not make, is an apparent attempt to distract this Court from the arguments actually set forth in Petitioner's Brief.** Petitioner does not argue, as Respondent claims, that property rights are the sole determinants of privacy rights; or that *complete* control and dominion over a dwelling coupled with the right to exclude *all* others is necessary to create a legitimate expectation of privacy (Respondent's Brief, pp.17-21). Rather, Petitioner specifically acknowledges at pp.19-21 of its Brief that one can have a privacy interest in a place other than one's own home, and suggests that property rights and the right to exclude others are only two of twelve possible factors to consider in determining privacy rights.

Nor is it necessary, as Respondent argues at pp.21-23 of his Brief, that *Jones v. United States*, 362 U.S. 257 (1960) be overturned in order to reverse the Minnesota Supreme Court in this case; Petitioner has not asked this Court to do so. This case is readily distinguishable from *Jones* in that Jones, unlike Olson, possessed a key to his friend's apartment; had the right to exclude others; and had exclusive use of the apartment because the owner allowed Jones to remain while he was absent. This combination of factors led the Court to decide that Jones had a legitimate expectation of privacy in his friend's apartment;[2] the absence of these factors, or any of the other twelve factors suggested by Petitioner, compels the opposite result in the instant case.

---

[2] Petitioner agrees with Respondent that possession of a key is only one factor to be considered (*see* pp.18 and 21 of Petitioner's Brief).



**4. Respondent's criticisms of Petitioner's twelve-part "totality of the circumstances" test are unfounded.** Respondent chooses to apply Petitioner's suggested factors mechanistically and then argues the test is "mechanical." As Petitioner states in its Brief at p.21, the factors are not to be considered in isolation; the ultimate question remains whether one's claim to privacy from government intrusion is reasonable in light of *all* the surrounding circumstances. The twelve factors represent a flexible way to make a case by case analysis of the facts relevant to privacy expectations.

It is wrong to claim, as Respondent does in his Brief at pp.23-26, that the factors do not "favor guests of any duration" and therefore represent a "hidden attack on *Jones v. United States*." In fact, this Court found that Jones possessed a privacy expectation in his friend's apartment because of the presence of four of Petitioner's suggested factors: (d), (i), (j) and (k). *See* Petitioner's Brief, p.21. Other factors, such as (b), (g), (h) or (l), also do not necessarily preclude guests from having privacy interests. Significantly, none of the twelve factors were present in the instant case.[3]

It is true, as Respondent asserts, that police officers may not have sufficient information to analyze the twelve factors suggested by Petitioner in order to decide questions of privacy rights. Petitioner submits, however, that determinations of privacy interests should be decided by courts, which possess all the relevant facts, and not by policemen in the field. Police adherence to the Fourth Amendment is required whether or not the person(s) targeted by police have "standing" to object

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[3] Nor do the factors suggested by Respondent (Respondent's Brief, pp.28-29) significantly aid him. Of the four factors, only the first one, legitimate presence, favors Respondent.

to constitutional violations. Society's interest in privacy rights is better served by confining the policeman's role to determining questions such as the existence of probable cause and exigent circumstances, questions which the policeman is required to answer carefully in order to act legally. Later, when all the facts are gathered, a judicial determination can be made concerning the scope of the policeman's action.

## II. RESPONDENT'S WARRANTLESS ARREST WAS REASONABLE UNDER THE FOURTH AMENDMENT BECAUSE IT WAS JUSTIFIED BY EXIGENT CIRCUMSTANCES.

**1. Reversal of the Minnesota Supreme Court's decision will not "emasculate" *Payton v. New York*.** *Payton v. New York*, 455 U.S. 573 (1980) stands for the proposition that warrantless searches and seizures within the home are presumptively unreasonable in the absence of exigent circumstances. *Payton* does not define exigent circumstances because the issue was not properly before the Court; Respondent's attempts to use the case to support his position, (Respondent's Brief, pp.36, 40-41), therefore, are misplaced.[4] Where, as

[4] "The Court of Appeals majority treated both Payton's and Riddick's cases as involving routine arrests in which there was ample time to obtain a warrant, and we will do the same. Accordingly, we have no occasion to consider the sort of emergency or dangerous situation, described in our cases as 'exigent circumstances,' that would justify a warrantless entry into a home for the purpose of either arrest or search." 445 U.S. at 583. The facts of *Payton* cannot, therefore, be interpreted to define the parameters of a routine arrest, especially since this Court suggested that the opposite might be true: ". . . it is arguable that the warrantless entry to effect Payton's arrest might have been justified by exigent circumstances." *Id.*



in this case, police have probable cause to believe that a suspect committed a violent felony; have reason to believe he may be armed (*see* Petitioner's Brief, p.26); have probable cause as to the suspect's location; know that the suspect has escaped from police once and have information that he is preparing to flee again;[5] and know that the suspect is aware that the police are after him;[6] police must act quickly to prevent the suspect's escape and the endangerment of police officers and others. Such a holding of exigent circumstances does not undermine *Payton*.

**2. In citing testimony specifically rejected by the trial court at the pretrial hearing, Respondent fails to apply the proper limited standard of review of factual findings on appeal.** Respondent supports his legal arguments with Officer Von Lehe's testimony concerning police verification of the tip as to Respondent's location (Respondent's Brief, p.4, n.5, 42-43). Von Lehe's testimony, however, was contradicted by the testimony of Sergeant DeConcini and that of Von Lehe's partner, Officer Adamaz (R.149-50). The trial court rejected Von Lehe's testimony and accepted the testimony of the other two officers, specifically finding that Sergeant DeConcini sent

[5] The police took this tip seriously enough to stake out the bus depot the morning of Respondent's arrest (R.129); that Respondent had not yet left town does not make the tip "unfounded."

[6] Respondent's assertion that he was unaware he was sought by police is incredible, in light of the following facts: a) Respondent narrowly escaped from a police chase; b) Respondent was aware of Ecker's arrest; and c) Respondent was aware that his car had been impounded and searched. Under these circumstances; it cannot be said that the police created the exigency by alerting him to their presence.

police officers to the duplex to verify the tip before later sending them to arrest Respondent (J.A.5, 10). Similarly, Respondent relies on Julie Bergstrom's testimony about Sergeant DeConcini's telephone call into the duplex shortly before his arrest (Respondent's Brief, pp.37-38). The trial court, however, specifically rejected Julie Bergstrom's testimony about the conversation and instead accepted Sergeant DeConcini's testimony (J.A.5-6, 12). These factual findings made by the trial court at the pretrial suppression hearing must be accepted on appeal unless they are clearly erroneous. *Campbell v. United States*, 373 U.S. 487, 493 (1963). *See also Ker v. California*, 374 U.S. 23, 34 (1963) (It is not the function of the Supreme Court to appraise contradictory factual questions decided by state trial courts in assessing Fourth Amendment claims).

**3. Respondent underestimates the time necessary to obtain an arrest warrant and exaggerates the importance of the question.** As Petitioner explained in its Brief at pp.27-28, more time is needed to obtain an arrest warrant than a search warrant because a county attorney must review the police reports, decide whether to issue the complaint, dictate the complaint, arrange for a secretary to type the document, have it approved by a judge and then file it. A warrant could not have been obtained quickly on a Sunday, certainly not in the 45 minutes before Respondent returned to the duplex.

Moreover, Petitioner submits that whether exigent circumstances exist should not in most cases depend on the time required to obtain a warant: more important is the dangerousness of the suspect and the likelihood of his escape. Sergeant



DeConcini did not obtain an arrest warrant because he believed that he was faced with an emergency requiring Respondent's immediate arrest. Respondent's assertion, therefore, that Sergeant DeConcini "did not wish to disturb prosecutors during their vacation time" (Respondent's Brief pp.5, 30, 36) is not supported by the record.[7]

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[7] The sole references in the record to DeConcini's decision not to seek a warrant are contained at R.129-30 (quoted in Petitioner's Brief at p.27, n.15, and Respondent's Brief, pp.35-36) and at R.116:

Q. [by prosecutor]: . . . it's an arrest bulletin, right?
A. [by Sgt. DeConcini]: Yes, this is an arrest bulletin.
Q. Now, this was on the 19th, right, is that on a Sunday?
A. Yes.
Q. To your knowledge were any County Attorneys available for charging that day?
A. No.
Q. At least in the office?
A. At least in the office, no.

## CONCLUSION

For the foregoing reasons and those stated in Petitioner's opening brief, the judgment of the Minnesota Supreme Court should be reversed.

Respectfully submitted,

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January, 1990

(5)

No. 88-1916

# In the Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF MINNESOTA, PETITIONER

*v.*

RALPH D. OLSON

*ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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## QUESTIONS PRESENTED

1. Whether the defendant had a legitimate expectation of privacy in the home in which he had spent the previous night as a guest.

2. Whether exigent circumstances justified the warrantless entry of a home to arrest the defendant.

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**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER**

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## INTEREST OF THE UNITED STATES

This case presents two questions: whether the Fourth Amendment protects an overnight guest against an unlawful search of his hosts' home and, if so, whether exigent circumstances justified the warrantless entry into the home in this case.

Fugitives from justice and other suspects are frequently found in the homes of others. Accordingly, the United States has a significant law enforcement interest in the resolution of the question when, if ever, house guests can claim the protection of the Fourth Amendment in the premises in which they are found. In addition, federal law enforcement agents must often arrest criminal suspects without warrants either in their own homes or the homes

of others on the basis of exigent circumstances. The United States therefore has an interest in the Court's analysis and conclusion with respect to when circumstances are sufficiently exigent to permit law enforcement officers to make a warrantless entry into a home to make an arrest.

## STATEMENT

Following a jury trial in the Hennepin County, Minnesota, District Court, respondent was convicted on one count of first degree murder, three counts of armed robbery, and three counts of second degree assault. He was sentenced to life imprisonment on the murder count and a total of nine years' imprisonment on the three armed robbery counts. The second degree assault counts merged into the armed robbery counts for purposes of sentencing. On appeal, the Minnesota Supreme Court reversed respondent's convictions and ordered a new trial. Pet. App. A1-A14.

1. Just before 6 a.m. on the morning of July 18, 1987, a lone gunman robbed a gasoline station in Minneapolis, Minnesota, and shot and killed the station manager. The police learned of the robbery almost immediately and received a description of the robber that seemed to match Joseph Ecker. Two officers promptly drove to Ecker's home. At about 6:15 a.m., just as the officers arrived at Ecker's home, a brown Oldsmobile appeared in a nearby alley. The officers left their squad car, drew their weapons, and approached the Oldsmobile. The driver of the Oldsmobile put the car into reverse and rapidly backed away from the officers. The officers ran back to their squad car and pursued the Oldsmobile. Pet. App. A2, A16-A17.

The driver of the Oldsmobile lost control of the car as he tried to turn out of the alley. Two persons then jumped



out of the Oldsmobile and ran away on foot. After additional officers arrived, the police searched Ecker's house and captured Ecker inside. Ecker was later identified as the gasoline station gunman. The other occupant of the Oldsmobile escaped. The officers then searched the Oldsmobile. They found a sack of money and a gun that was later identified as the murder weapon. They also found a certificate of title to the car containing respondent's name and a letter addressed to "Roger R. Olson." In addition, they found a video movie rental receipt made out to respondent and dated July 16, 1987, just two days earlier. The police verified that respondent lived at the address listed on the letter. Pet. App. A2, A17.

The next day, the police received a call from a woman who said that a man named "Rob" had told several persons that he was the driver of the getaway car in the gasoline station robbery. The caller added that "Rob" was planning to leave town soon by bus. She further told the police that two of the persons "Rob" had told about his involvement in the crime were Louanne and Julie Bergstrom, who lived at 2406 Fillmore, N.E., in Minneapolis. Pet. App. A3, A17-A18.

Two detectives went to the house at that address, which was a duplex. A woman who lived in the lower unit said that the Bergstroms lived in the upper unit but were not home. She added that respondent was staying upstairs but was absent at the moment. She promised to call the police when respondent returned. Pet. App. A3, A18.

At approximately 2 p.m. that afternoon, the police department issued an order to pick up respondent. Thirty to 45 minutes later, the woman from the lower unit of the duplex called the police and said that respondent had returned to the upstairs unit. Once again, officers were dispatched to that address. Pet. App. A3-A4, A18-A19.

After the officers had taken positions outside the duplex, a police detective telephoned the upstairs unit and reached Julie Bergstrom. The detective told her that he wanted respondent to come outside, whereupon the detective overheard a male voice whisper, "Tell them I left." Bergstrom then told the detective, "Rob left already." Pet. App. A4, A19.

The detective relayed that exchange to the officers stationed outside the house. The officers then drew their weapons and entered the house. They found respondent hiding in a closet and placed him under arrest. After his arrest, respondent admitted that he drove the Oldsmobile getaway car in the robbery. Pet. App. A4, A19.

2. The trial court denied respondent's motion to suppress his pretrial statement. At the suppression hearing, respondent testified that (1) he stayed with the Bergstroms one night; (2) he had no bed and slept on the floor; and (3) he had not used any closet or dresser in the house, and he had only one bag of clothes, which he was carrying with him. Pet. App. A19. Based on that evidence, the trial court held that respondent had no reasonable expectation of privacy in the Bergstroms' house. Pet. App. A20-A22. The court therefore concluded that respondent lacked standing to challenge the admission of his statement to the police, even if that statement was the product of an illegal entry into the Bergstroms' house. Pet. App. A21.

3. The Minnesota Supreme Court reversed. It first held that respondent had standing to challenge the police entry into the premises at 2406 Fillmore. The court held that respondent had a legitimate expectation of privacy as a guest in the Bergstroms' home because he "had permission to stay at 2406 Fillmore for some indefinite period," and because Louanne Bergstrom had testified that respondent "had the right to allow or refuse visitors entry."



Pet. App. A8. The court drew an analogy between respondent's situation and that of the defendant in *Jones* v. *United States*, 362 U.S. 257 (1960). The court found sufficient similarity between the circumstances of respondent and Jones because both defendants had been overnight guests and had only a few clothes with them during their respective stays, even though Jones, unlike respondent, was the solitary occupant of his friend's apartment and possessed a key. See 362 U.S. at 259.

The court next turned to the question whether exigent circumstances justified a warrantless entry into the Bergstroms' home. To determine whether exigent circumstances existed, the court applied the balancing test proposed in *Dorman* v. *United States*, 435 F.2d 385, 392-393 (D.C. Cir. 1970) (en banc). As applied by the Minnesota Supreme Court, that test calls for the court to balance the following factors:

> (a) whether the offense is a grave offense, particularly a crime of violence; (b) whether the suspect is reasonably believed to be armed; (c) whether the showing of probable cause connecting the defendant to the offense is more than minimal; (d) whether the police have strong reasons to believe that the suspect is in the premise being entered; and (e) whether there is a likelihood that the suspect will escape if not swiftly apprehended.

Pet. App. A10 n.1.[1]

Applying the *Dorman* test to the facts of this case, the Minnesota Supreme Court concluded that the circumstances were not sufficiently exigent to justify the war-

[1] The court of appeals in *Dorman* actually listed seven factors. In addition to the five listed by the Minnesota Supreme Court, the remaining two factors were whether the entry was made peaceably and whether the entry was made at night. 435 F.2d at 393.

rantless entry into the Bergstroms' unit to arrest respondent. Factor (a) was uninformative, according to the court, because although murder is a grave crime, respondent only drove the getaway car. Factor (b) counseled weakly against a finding of exigent circumstances, because the police had already recovered the murder weapon, which the court concluded meant that respondent was probably unarmed. Factor (c) also counseled weakly against a finding of exigent circumstances; the Minnesota Supreme Court did not reject the trial court's finding of probable cause, but it did state that probable cause depended "in large part on the reliability of the unknown informant." Factor (d) favored a finding of exigent circumstances, because the police had strong reason to believe that respondent was in the duplex when they entered it. Factor (e) was apparently the dispositive consideration for the Minnesota Supreme Court: respondent had not yet left town, the police knew where he was, and the presence of "[t]hree or four Minneapolis police squads" surrounding the house meant that respondent "was going nowhere." Pet. App. A10-A11.

Under these circumstances, the court held, the police should have tried to obtain an arrest warrant for respondent before entering the Bergstroms' home to arrest him. The court acknowledged that it was not clear that the police could have obtained an arrest warrant in the hour between the time the police issued the pick-up order for respondent (2 p.m.) and the time the police arrived at the Bergstroms' house (approximately 3 p.m.). The court noted, however, that the State did not "suggest[] that the warrant could not have been obtained," and a warrant to search the Oldsmobile was obtained in two and one half hours on the previous day "when the urgency to search an already impounded car was much less." Pet. App. A12.



Accordingly, the court concluded that the State failed to meet its burden to establish exigent circumstances, and the entry into the Bergstroms' home was therefore unlawful. Pet. App. A13-A14.

## SUMMARY OF ARGUMENT

1. The Fourth Amendment did not protect respondent, an overnight guest, from an unlawful entry into the Bergstroms' home. In order to mount a Fourth Amendment challenge to a search, the defendant must show that he had a legitimate expectation of privacy in the property that was searched. Respondent may not claim a legitimate expectation of privacy in the Bergstroms' home because he had neither a property interest in that home nor an equivalent non-property interest recognized by social convention. The best measure of respondent's lack of any property or non-property interest sufficient to trigger Fourth Amendment rights is that respondent did not have the right to exclude others from the Bergstroms' home or from the place in the home where he was found. The fact that respondent was legitimately on the premises as an invited guest is not sufficient to give him a right to challenge an entry into the premises; a person who bases his Fourth Amendment challenge solely on his legitimate presence on the premises is not challenging the invasion of his own rights, but is in effect challenging the invasion of the rights of the third parties whose guest he was.

2. Even if respondent had standing to challenge the police entry into the Bergstroms' home, the state court was wrong in suppressing his post-arrest statements, because exigent circumstances justified the warrantless entry. The state court relied on a multi-factor test to find that the police acted without exigent circumstances. Based on that test, the state court concluded that the police should not

have entered the Bergstroms' house even after respondent learned that the police were pursuing him and knew where he was.

The multi-factor test on which the state court relied lacks sufficient predictability to guide law enforcement officers in the highly charged setting of a police stake-out. A simpler and clearer rule would provide better guidance to police without encroaching on Fourth Amendment interests. In our view, the circumstances should be deemed exigent when a suspect who is implicated in a serious crime or who is thought to be armed discovers that he has been cornered by the police and faces imminent arrest. In that setting, a delay in arresting the suspect creates risks to the police, to other persons in the house where the suspect is staying, and to innocent passers-by. A suspect cornered in that fashion over a several-hour period may, at the least, seek to destroy evidence, or he may take hostages, attempt a break-out, or engage in a shoot-out with the police. Because of the dangers so often presented in that setting, the police should not have to identify a particular risk that renders the circumstances exigent in a particular case. Instead, the police should be entitled to act without delay in order to defuse an inherently volatile situation before the danger materializes in the form of injury to persons or loss of evidence.



## ARGUMENT

### I. AN OVERNIGHT GUEST ORDINARILY DOES NOT ENJOY FOURTH AMENDMENT RIGHTS IN HIS HOST'S PREMISES

#### A. To Invoke The Protection Of The Fourth Amendment With Respect To Physical Searches Of Real Or Personal Property, A Defendant Must Prove He Had A Right To Exclude Others From The Premises

In *Rakas* v. *Illinois*, 439 U.S. 128, 143 (1978), this Court held that the "capacity to claim the protection of the Fourth Amendment depends * * * upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." That test, derived from *Katz* v. *United States*, 389 U.S. 347, 353 (1967), requires that a defendant have a subjective expectation of privacy that society recognizes as reasonable. *Rakas*, 439 U.S. at 143-144 n.12; *Katz*, 389 U.S. at 361 (Harlan, J., concurring). The requirement that a defendant have a legitimate expectation of privacy follows from the principle that Fourth Amendment rights are personal in nature: "A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of *his* Fourth Amendment rights infringed." 439 U.S. at 134 (emphasis added). Thus, *Rakas* disapproved the reasoning of *Jones* v. *United States*, 362 U.S. 257, 267 (1960), which had allowed anyone "legitimately on the premises" to contest a search or seizure, because that standard allowed defendants to assert the Fourth Amendment rights of third parties. The legitimately-on-the-premises standard

> would permit a casual visitor who has never seen, or been permitted to visit, the basement of another's house to object to a search of the basement if the

> visitor happened to be in the kitchen of the house at the time of the search. Likewise, a casual visitor who walks into a house one minute before a search of the house commences and leaves one minute after the search ends would be able to contest the legality of the search. The first visitor would have absolutely no interest or legitimate expectation of privacy in the basement, the second would have none in the house, and it advances no purpose served by the Fourth Amendment to permit either of them to object to the lawfulness of the search.

439 U.S. at 142.

The first clause of the Fourth Amendment makes clear that the Amendment focused principally on the protection of interests in property. The clause states that the Amendment protects "[t]he right of the people to be secure in *their* persons, houses, papers, and effects, against unreasonable searches and seizures * * * *."[2] As applied to physical searches of real or personal property, that language suggests that ordinarily a defendant must have a property interest in the place or thing that is searched in order to have a right to object to the search. See *Simmons* v. *United States*, 390 U.S. 377, 389-390 (1968); *Goldman*

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[2] As originally drafted by James Madison, the emphasis on property rights was even clearer. The draft amendment safeguarded "[t]he rights of the people to be secured in *their* persons[,] *their* houses, *their* papers, and *their other property*, from all unreasonable searches and seizures * * * *." 1 Annals of Cong. 452 (1789) (emphasis added). The version of the amendment reported by the Committee of Eleven deleted the repetitious use of the possessive "their," and narrowed the phrase "other property" to "effects." *Id.* at 783. The Committee of Three split the amendment into two clauses, one securing the people's liberty from unreasonable searches and seizures and a second regulating the use of warrants. But the Framers' intention to protect property rights is evident at every stage of the drafting process.



v. *United States*, 316 U.S. 129, 134-136 (1942); *Olmstead* v. *United States*, 277 U.S. 438, 464-466 (1928). To have a property interest in particular premises generally means that the owner enjoys the right to exclude others from the premises. For of all the rights attaching to property, perhaps the most important is the right to exclude others. *Kaiser Aetna* v. *United States*, 444 U.S. 164, 179-180 (1979) ("the 'right to exclude' * * * [is] universally held to be a fundamental element of the property right"). See 2 W. Blackstone, *Commentaries*, ch. 1. Thus, "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude." *Rakas*, 439 U.S. at 144 n.12.

In *Katz* v. *United States*, this Court rejected the contention that the Fourth Amendment "limits only searches and seizures of tangible property" and extended the Constitution's protection to persons who have a legitimate expectation of privacy in a particular place or thing. 389 U.S. at 352-353; *id.* at 361 (Harlan, J., concurring). The Court in *Katz* did not attempt to define with precision when persons can be said to have a legitimate expectation of privacy, and the Court has not subsequently embraced any single test for making that determination. We submit that, at least in the case of physical searches of real or personal property, a person who does not have a recognized legal interest in property may invoke the protection of the Fourth Amendment with respect to that property only if he enjoys the distinguishing feature and chief quality of the property rights that are explicitly protected by the Amendment – the right to exclude others. Thus, in order for a person to have a protected Fourth Amendment interest in a particular place, he must have a right to exclude others from that place, either by "reference to concepts of

real or personal property law," or by virtue of "understandings that are recognized and permitted by society." *Rakas,* 439 U.S. at 144 n.12.

The "right to exclude" test is consistent with this Court's Fourth Amendment decisions. In *Katz,* for example, the Court held that a defendant who placed a telephone call in an enclosed booth had a legitimate expectation of privacy. 389 U.S. at 352-353, 359. The "critical fact," *id.* at 361 (Harlan, J., concurring), on which that privacy expectation rested was the defendant's reasonable assumption that when he closed the door behind him—thereby excluding others from his conversation—he would not be overheard:

> One who occupies [a telephone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.

*Id.* at 352 (opinion of Court). Although the defendant in *Katz* may not have had a possessory interest in the telephone booth for purposes of state property law, he had a right to exclude others for the duration of his telephone call as a matter of social custom and convention, and for that reason had a legitimate expectation of privacy.

The same right-to-exclude theme runs through the examples of other legitimate expectations of privacy provided by the *Katz* Court. The Court remarked that "[n]o less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment." 389 U.S. at 352. In the case cited in the margin to illustrate the first example, *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385 (1920), the defendants were father



and son and owned the company, *id.* at 390; by virtue of their ownership interest, the Silverthornes had the undoubted right to exclude others from the plant and grounds and therefore enjoyed a legitimate expectation of privacy in their business office. Likewise, in the case cited to illustrate the second example, *Jones* v. *United States, supra,* "Jones had complete dominion and control over the apartment" and, "[e]xcept with respect to his friend" who rented the apartment and was away on a five-day trip at the time, Jones "could exclude others from it." *Rakas,* 439 U.S. at 149. Finally, in the case cited to illustrate the third example, *Rios* v. *United States,* 364 U.S. 253, 262 n.6 (1960), the Court observed that "[a]n occupied taxicab is not to be compared to * * * a vacated hotel room, *Abel* v. *United States,* 362 U.S. 217 [(1960)]" (where the hotel management has the "exclusive right to its possession," 362 U.S. at 241), but is presumably to be likened to an occupied hotel room (which is a "temporarily private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable." *Katz,* 389 U.S. at 361 (Harlan, J., concurring)). The common denominator among the Court's examples is a right to exclude others, whether that right is conferred by state property law or by shared social understandings.

Since *Katz,* this Court has continued to recognize that the right to exclude is a key element in determining whether an individual has a legitimate expectation of privacy in a particular object or place. In *Rakas* v. *Illinois,* 439 U.S. at 149, the Court noted that unlike the defendents in *Jones* and *Katz,* the defendants in *Rakas* had no right to exclude others from the areas of the automobile where the incriminating evidence was seized. Similarly, in *Rawlings* v. *Kentucky,* 448 U.S. 98, 105-106 (1980), the Court pointed to the defendant's lack of any

right to exclude others from access to an acquaintance's purse in explaining why the defendant could not be deemed to have a legitimate expectation of privacy in the purse.

To be sure, the "right to exclude" does not provide a simple, bright-line rule that can resolve every case. In some cases, a right to exclude may not be enough to ensure the protection of the Fourth Amendment. It is well-settled, for example, that the Fourth Amendment does not protect against entry into "open fields," even if the owner of the fields has a right under local law to exclude trespassers. See *Oliver* v. *United States,* 466 U.S. 170, 177-181, 183-184 (1984). The same may be true for other invasions of property rights that are de minimis in nature and therefore not considered "searches" under Fourth Amendment law even though the owner of the property may have a technical legal right against trespass. See, *e.g.*, *New York* v. *Class,* 475 U.S. 106 (1986) (opening of automobile door to see inspection sticker not a "search"); *Cardwell* v. *Lewis,* 417 U.S. 583, 591-592 (1974) (plurality opinion) (taking paint scrapings from automobile not a "search" under the circumstances). As another example, a friend who is asked to watch a homeowner's house for a brief period of time while the owner is away may have a right to exclude others from the premises, but may not have a legitimate expectation of privacy under state property law or shared social conventions. Nonetheless, we submit that the "right to exclude" test serves as a useful guideline for most cases involving searches of real and personal property, and at least where a right to exclude is absent, Fourth Amendment protections should not be found to apply.[3]

[3] While we believe that the "right to exclude" test is a useful device for analyzing physical searches of real and personal property, it is not as useful in determining whether other kinds of invasions, such as the interception of conversations, *Berger* v. *New York,* 388 U.S. 41



**B. Overnight Guests Such As Respondent Have No Right To Exclude Others**

1. In most circumstances, an overnight guest such as respondent will lack a right to exclude others and for that reason will have no legitimate expectation of privacy in the host's home. To begin with, overnight guests—like casual visitors—have no legitimate expectation of privacy conferred by property law because they neither own nor possess the host's house under state property law. Social conventions similarly do not support an expectation of privacy for a guest in most areas of the host's home. When a guest is invited into a home, the host waives his right to eject the guest as a trespasser; the host does not delegate to his guest *his* right to eject *others* as trespassers. For example, a defendant could not object if the host held a party to which he invited some neighbors who happened to be police officers. Nor could the guest object if the host consented to the police officers' entry. Generally speaking, guests have no right to exclude others from shared areas of the house (like the kitchen, dining room, living room, and bathrooms) or from areas of the home reserved for the host's exclusive use (such as the host's bedroom).[4] Cf.

(1967), or the taking of urine samples for drug testing, *National Treasury Employees Union* v. *Von Raab,* 109 S. Ct. 1384 (1989), constitute "searches" within the meaning of the Fourth Amendment

[4] See, *e.g.*, *United States* v. *Nabors,* 761 F.2d 465, 468-470 (8th Cir.) (defendant who was merely present at time of search had no legitimate expectation of privacy), cert. denied, 474 U.S. 851 (1985); *United States* v. *Adamo,* 742 F.2d 927, 947-948 (6th Cir. 1984) (guest at birthday party had no legitimate expectation of privacy to contest search of apartment), cert. denied, 469 U.S. 1193 (1985); *United States* v. *Robinson,* 698 F.2d 448, 454-455 (D.C. Cir. 1983) (mere guest had no legitimate expectation of privacy); *United States* v. *Meyer,* 656 F.2d 979, 980-982 (5th Cir. 1981) (defendants lacked legitimate expectation of privacy to contest "illegal warrantless search of the bathroom cabinet"—"a room they do not allege to have entered"), cert. denied, 465 U.S. 1065 (1984); *Chupp* v. *State,* 509 N.E.2d 835, 838 (Ind. 1987) (visitor to house lacked legitimate expec-

*Rakas,* 439 U.S. at 148-149. At most, overnight guests have the right to exclude others from the guest bedroom—an area that the host usually surrenders to his visitor for the duration of his stay and with respect to which social convention recognizes that the host can be said to delegate his right to exclude others.[5]

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tation of privacy to contest search of another visitor's bag because he "had no control over the premises"); *Lee* v. *State,* 419 N.E.2d 825, 828 (Ind. App. 1981) (defendant lacked legitimate expectation of privacy as overnight guest in house trailer); *People* v. *Carter,* 128 Mich. App. 541, 547, 341 N.W.2d 128, 132 (1983) (per curiam) (defendant had no expectation of privacy in bathroom he was using at the time of the search because he was "merely a transient visitor" who "only occasionally spent the night there"), rev'd on other grounds, 422 Mich. 938, 369 N.W.2d 852 (1985); *Hicks* v. *State,* 96 Nev. 82, 83, 605 P.2d 219, 220 (1980) (defendant who was present in apartment lacked legitimate expectation of privacy to contest search); *People* v. *Rodriguez,* 69 N.Y.2d 159, 164, 513 N.Y.S.2d 75, 78, 505 N.E.2d 586, 589 (1987) (defendant sleeping alone in apartment lacked legitimate expectation of privacy because he "was a transient who had no indicia of legitimate or recognizable connection to the apartment where he was arrested or any relevant thing in that apartment," which belonged to his drug supplier); *Commonwealth* v. *Tann,* 500 Pa. 593, 459 A.2d 322, 325 (1983) (defendant had no legitimate expectation of privacy when present only for a social visit for 10-15 minutes). But see *United States* v. *Echegoyen,* 799 F.2d 1271, 1277 (9th Cir. 1986) (defendant had a legitimate expectation of privacy because he was present at time of search and "was an invited overnight guest"); *State* v. *Adkins,* 346 S.E.2d 762, 766 (W.Va. 1986) (defendant had a legitimate expectation of privacy because he was present at time of search and "was more then a casual visitor").

[5] See, *e.g., United States* v. *Rackley,* 742 F.2d 1266, 1270 (11th Cir. 1984) (house guests had legitimate expectation of privacy, if at all, limited to guest bedroom where they stayed and not in other parts of premises where evidence found).



Although an overnight guest generally lacks a legitimate expectation of privacy in most areas of his host's home, particular types of guests may well have a legitimate expectation of privacy in some circumstances. First, where state property law gives a possessory interest to a guest, the guest has a legitimate expectation of privacy. A hotel guest, for example, has a legitimate expectation of privacy in his hotel room for that reason.[6] In addition, social conventions can bestow an expectation of privacy. A house sitter who is given temporary possession of an apartment or home for more than a brief period of time has a legitimate expectation of privacy in the premises.[7] *Jones* v. *United States, supra,* illustrates that point. "Jones had a legitimate expectation of privacy in the premises he was using * * * even though his 'interest' in those premises might not have been a recognized property interest at common law." *Rakas,* 439 U.S. 143. The reason was that during his friend's absence, Jones "had complete dominion and control over the apartment and could exclude others from it." *Id.* at 149. For similar reasons, a host's long-term, live-in companion may share the host's right to exclude others.[8]

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[6] See, *e.g., United States* v. *Lyons,* 706 F.2d 321, 326-329 (D.C. Cir. 1983) (occupant of hotel room has a legitimate expectation of privacy because room is "tendered for his sole use during this stay in the city").

[7] See, *e.g., State* v. *Isom,* 196 Mont. 330, 338, 641 P.2d 417, 421 (1982) (defendant had a legitimate expectation of privacy because he "was the sole occupant of the residence at the time of the search and had control and dominion over it to the exclusion of others").

[8] See, *e.g., People* v. *Wagner,* 104 Mich. App. 169, 175, 304 N.W.2d 517, 520 (1981) (defendant had legitimate expectation of privacy because he had moved into his girlfriend's townhouse, had been there an indefinite time, and kept his clothes there); *State* v. *Whitehead,* 229 Kan. 133, 137, 622 P.2d 665, 669 (1981) (defendant had legitimate expectation of privacy because he "lived there with Ms. Presley on an

2. Respondent had no right to exclude others from either the Bergstroms' residence as a whole or the shared bedroom on whose floor he had slept the previous night. To be sure, the Minnesota Supreme Court found that respondent had a "right to allow or refuse visitors entry" and that respondent had "permission to stay at 2406 Fillmore for some indefinite period." Pet. App. A8. But the factual predicate on which the court based its conclusion that respondent had a right to exclude others is so emphemeral that it could be satisfied in virtually every case. The court based its finding on the testimony of Louanne Bergstrom. Pet. App. A8. Ms. Bergstrom's testimony, however, concerned respondent's authority to admit or exclude *his guests,* not the Bergstroms', and even on that point, the testimony was equivocal:

> Q. [by defense attorney]: And if somebody came over to see [respondent], did he have your permission to admit them or refuse to admit them?
>
> A. [by Louanne Bergstrom]: I don't know. It was never discussed.
>
> Q. Had somebody come over to visit [respondent], would you have allowed him to decide if that person would visit with him?
>
> A. If I saw no reason not to.

Pet. 7 (quoting R. 192).[9]

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irregular basis"); *State* v. *Allen,* 188 Mont. 135, 141, 612 P.2d 199, 202 (1980) (defendant had legitimate expectation of privacy in apartment because he "shared it with his girl friend and except with respect to her had complete dominion and control over the apartment and could exclude others from it").

[9] The court's "finding" that Olson had the right to exclude others from the Bergstroms' home is not a factual finding binding on this Court. Because the state court's conclusion that Olson had the



The colloquy between respondent's attorney and Louanne Bergstrom fails to discharge respondent's burden to prove that he had a right to exclude others from the Bergstroms' home. See *Rakas,* 439 U.S. 131 n.1. There is no testimony to suggest that respondent had the right to exclude from the premises other guests who might have been admitted by the Bergstroms (such as the police); respondent therefore lacked a legitimate expectation of privacy in the premises as a whole. Even if respondent's legitimate expectation of privacy turned on his right to admit or exclude *his own* guests – which it does not – the colloquy reveals that respondent had a right to exclude only if his host "saw no reason not to" contradict his decision. A "right" conditioned on the approval of another, however, is no right at all; any guest has a "right" to admit or exclude others as long as the exercise of that "right" is consistent with the host's own desires.

More fundamentally, the question whether respondent had the right to exclude others from the Bergstroms' house should be determined not by any express authorization given by Louanne Bergstrom, but by respondent's actual use of the premises in light of shared social conventions. In this case, there is no evidence that respondent in fact had the right to exclude others from the Bergstroms' home, and that fact, in view of the societal understanding that overnight guests usually do not have the right to exclude others from the common areas of the house, establishes that respondent cannot contest the police of-

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right to exclude others presupposes application of the correct legal standard (*e.g.,* whether the right need encompass only Olson's guests or the Bergstroms' as well), it is a mixed finding of law and fact to which no special deference is due. See *Turner* v. *Safley,* 482 U.S. 78, 93-94 n.* (1987); *Bose Corp.* v. *Consumers Union of United States, Inc.,* 466 U.S. 485, 501 (1984); *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.,* 456 U.S. 844, 855 n. 15 (1982).

ficers' entry into the Bergstroms' home. The contrary rule would allow legitimate expectations of privacy to be created by unilateral oral assignment rather than property interests grounded in state law or shared social customs.[10]

Nor did respondent have a right to exclude others, including the police, from the bedroom closet in which he was found. Respondent was not found in a bedroom given by Louanne Bergstrom for respondent's exclusive use. To the contrary, respondent slept for a single night on the floor of the bedroom and shared those quarters with one or more of the Bergstroms. In no sense did respondent acquire privacy interests in the bedroom by virtue of the very brief and casual use he made of it.

Without a right to exclude others, respondent's expectation of privacy rested, according to the Minnesota Supreme Court, on the open-ended duration of his stay. But that fact says no more than that respondent was legitimately on the premises at the time the police arrested him. It therefore bears a fatal resemblance to the test for Fourth Amendment standing declared in *Jones* v. *United States*, 362 U.S. at 267, and overruled in *Rakas* v. *Illinois*, 439 U.S. at 142, because it created "too broad a gauge for measurement of Fourth Amendment rights." Because respondent lacked a right to exclude others from the Bergstroms' home and the bedroom closet within, he could not contest the legality of the police officers' search of either place.

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[10] If Fourth Amendment rights could be so easily assigned, a homeowner presiding over a meeting of narcotics dealers could kick off the transactions by announcing that "I delegate to everyone present the right to exclude others, particularly the police, from my house." Cf. *Rakas*, 439 U.S. at 167 (White, J., dissenting).



## II. EXIGENT CIRCUMSTANCES EXIST WHENEVER A SUSPECT IMPLICATED IN A VIOLENT CRIME OR THOUGHT TO BE ARMED DISCOVERS THAT HE HAS BEEN CORNERED BY POLICE

It is well recognized that probable cause and exigent circumstances can support a warrantless arrest inside a home. See *Welsh* v. *Wisconsin*, 466 U.S. 740, 749 & n.11 (1984); *Steagald* v. *United States*, 451 U.S. 204, 211 (1981); *Payton* v. *New York*, 445 U.S. 573, 583 (1980); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 477-478 (1971). What is less clear is what standard should be used to determine whether the circumstances are sufficiently exigent to permit a warrantless entry.

1. In holding that the circumstances in this case did not sufficiently justify the warrantless entry into the Bergstroms' home, the Minnesota Supreme Court used a multi-factor test first proposed in *Dorman* v. *United States*, 435 F.2d 385, 392-393 (D.C. Cir. 1970) (en banc). That test looks to the following factors in determining exigency: the gravity of the offense, the possibility that the suspect is armed, the degree of probable cause, the probability that the suspect is on the premises, the likelihood of escape, the circumstances of the entry, and the time of the entry.

Although *Dorman* has been widely followed,[11] the experience of the lower courts in applying the *Dorman* test

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[11] See, *e.g.*, *United States* v. *Crespo*, 834 F.2d 267, 270 (2d Cir. 1987), cert. denied, 108 S. Ct. 1471 (1988); *United States* v. *Standridge*, 810 F.2d 1034, 1037 (11th Cir.) (per curiam), cert. denied, 481 U.S. 1072 (1987); *United States* v. *Baldacchino*, 762 F.2d 170, 176-177 (1st Cir. 1985); *United States* v. *Martinez-Gonzalez*, 686 F.2d 93, 100-102 (2d Cir. 1982); *United States* v. *Kulcsar*, 586 F.2d 1283, 1287 (8th Cir. 1978); *United States* v. *Campbell*, 581 F.2d 22, 26 (2d Cir. 1978); *United States* v. *Shye*, 492 F.2d 886, 891-892 (6th Cir. 1974); *Salvador* v. *United States*, 505 F.2d 1348, 1351-1352 (8th Cir. 1974); *Vance* v. *North Carolina*, 432 F.2d 984, 990-991 (4th Cir. 1970). See generally *Welsh* v. *Wisconsin*, 466 U.S. at 751. But see *Llaguno* v. *Mingey*, 763 F.2d 1560, 1564 (7th Cir. 1985) (en banc) (rejecting *Dorman's* "checklist-type analysis" in favor of reasonableness inquiry).

reveals that it fails what should be its principal purpose: to guide police officers seeking to stay within constitutional bounds. See *New York* v. *Belton*, 453 U.S. 454, 458 (1981). The *Dorman* test simply describes some of the considerations bearing on the decision whether exigent circumstances are present in a particular case and leaves it at that. It fails to resolve any case in which the seven factors point in more than one direction. This case furnishes a perfect illustration of the problem. In favor of a finding of exigent circumstances, the Minnesota Supreme Court found that the police had strong reason to believe that respondent was on the premises. Against a finding of exigent circumstances, the state court found that respondent did not have the murder weapon, that there was not strong probable cause to implicate him in the robbery/murder,[12] and that the likelihood of respondent's escape was minimal because the police had the premises surrounded. The court thought that the gravity of the crime was unilluminating because respondent was suspected only of driving the getaway car.

One can, of course, quarrel with the Minnesota Supreme Court's application of the *Dorman* factors in this case. Although the police had recovered the murder weapon from the Oldsmobile, the search of that car had uncovered two holsters, and no other handgun was found. Pet. App. A33. The police could therefore reasonably have supposed that respondent was armed. Moreover, as

[12] The Minnesota Supreme Court did not review the trial court's finding of probable cause because it concluded that the warrantless entry into the Bergstroms' house violated the Fourth Amendment without regard to whether the police had probable cause to link respondent to the crime. Pet. App. A7. That issue would be open on remand in the event that this Court reverses the judgment of the Minnesota Supreme Court.



the driver of a getaway car involved in an armed robbery and murder, the charges respondent faced were very serious (as respondent's ultimate convictions and sentence prove). They gave respondent every reason to resist capture or to flee, as he had done once when stopped by the police in the Oldsmobile and as the anonymous tipster warned that he planned to do again.

The problem, however, lies not just with the state court's application of the *Dorman* test to the facts of this case but with the *Dorman* test itself. That test simply cannot resolve cases in which the factors point in more than one direction—which is not a rare occurrence. See, *e.g.*, *United States* v. *Lindsay*, 506 F.2d 166, 171-172 (D.C. Cir. 1974); *Commonwealth* v. *Wagner*, 486 Pa. 548, 557-558, 406 A.2d 1026, 1031 (1979). The test thus lacks descriptive power—*i.e.*, the capacity to explain judicial decisions. More importantly, the *Dorman* test lacks prescriptive power—*i.e.*, the ability to predict in advance of a judicial decision whether the circumstances are sufficiently exigent to justify the police in proceeding without a warrant. See *Welsh*, 446 U.S. at 761-762 (White, J., dissenting). As Professor LaFave correctly observes, the *Dorman* test requires "the making of on-the-spot decisions by a complicated weighing and balancing of a multitude of imprecise factors" and is therefore "too sophisticated" to be applied "correctly with a fair degree of consistency by well-intentioned police officers." 2 W. LaFave, *Search and Seizure* § 6.1(f), at 599-600 (2d ed. 1987).[13]

[13] Accord, Donnino & Girese, *Exigent Circumstances for a Warrantless Home Arrest*, 45 Alb. L. Rev. 90, 99-106 (1980); Harbaugh & Faust, *"Knock on Any Door"—Home Arrests After* Payton *and* Steagald, 86 Dick. L. Rev. 191, 225 (1982); Note, 1978 U. Ill. L.F. 655, 678.

2. Although we do not propose a universal test for determining the existence of exigent circumstances, considerable certainty would be provided in an important area by a rule that circumstances are exigent whenever a suspect implicated in a violent crime or thought to be armed discovers that he has been cornered by the police. In that circumstance, the only alternative to an immediate warrantless entry and arrest of the suspect is for some officers to stake out the premises while others attempt to obtain a warrant.

If a fugitive suspected of perpetrating a violent crime discovers that he is the target of a stake-out, the police face a serious risk of evidence destruction, hostage-taking, or a shoot-out endangering themselves and innocent passersby. The appearance of police officers confirms to the suspect that the police have discovered "both his identity and his address." *United States* v. *Crespo*, 834 F.2d at 271. Their appearance creates a likelihood that "evidence might be destroyed if they [do] not enter the apartment swiftly." *Ibid.* "More importantly, any delay increase[s] the risk that innocent members of the public might be injured if [the suspect] attempt[s] to leave." *United States* v. *Standridge*, 810 F.2d at 1037; *United States* v. *Salvador*, 740 F.2d 752, 758 (9th Cir. 1984), cert. denied, 469 U.S. 1196 (1985). "It [is] safer to arrest [the suspect] immediately * * * than to wait for a warrant, and to risk a gun battle erupting in the halls, stairs, lobby or other public area" should the suspect try to escape. *United States* v. *Standridge*, 810 F.2d at 1037. For those reasons, courts should not "second-guess th[e] tactical decision [of the police on the scene] to deny the suspect the advantages that delay to procure a warrant would have presented." *United States* v. *Williams*, 612 F.2d 735, 739 (3d Cir. 1979), cert. denied, 445 U.S. 934 (1980).

In this case, the police surrounding the Bergstroms' house knew that respondent had overheard the detective's



telephone call to Julie Bergstrom and that respondent was therefore tipped off that the police were pursuing respondent and knew his whereabouts. The police were also aware that respondent was implicated in a violent crime and might well be armed. In addition, upon realizing that the police had surrounded the house, respondent could have taken one of the Bergstroms hostage in an attempt to make good his escape. Alternatively, he could have barricaded himself in the Bergstroms' upper unit and engaged in a shoot-out with police. Of course, if respondent possessed any evidence implicating him in the gasoline station robbery and murder, any delay would have given respondent an opportunity to destroy it.

The police should not have to assume those risks. "The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others." *Warden* v. *Hayden*, 387 U.S. 294, 298-299 (1967). Nor must police stand idly by when they have a "realistic expectation that any delay would result in destruction of evidence." *United States* v. *Santana*, 427 U.S. 38, 43 (1976). See *Welsh* v. *Wisconsin*, 466 U.S. at 754; *Vale* v. *Louisiana*, 399 U.S. 30, 35 (1970).

The police decisions to dispatch officers to the scene and to call Julie Bergstrom cannot be criticized as attempts to create a situation in which exigent circumstances would require the police to effect a warrantless entry to arrest respondent. The informant's tip, which suggested that respondent intended to flee, justified the dispatch of police officers to the Bergstroms' house. Once there, the police were certainly justified in attempting to lure respondent outside to effect a warrantless arrest outside the Bergstroms' home. The alternative—staking out an unfamiliar building with an unknown number of exits and

thereby immobilizing significant and limited police resources—is unreasonable. See *Payton* v. *New York*, 445 U.S. at 619 (White, J., dissenting) ("[T]he costs of such a stakeout seem excessive in an era of rising crime and scarce police resources.").[14]

Nor would it have been sufficient for the police to obtain a warrant for respondent's arrest, as the Minnesota Supreme Court seemed to assume. Quite apart from the question whether a warrant could have been obtained in one hour on a Sunday afternoon, an arrest warrant would not have authorized the entry into the Bergstroms' house to arrest respondent. See *Steagald* v. *United States, supra.* If the police officers needed a warrant to enter, they needed a search warrant.[15] Before the officers overheard respondent whispering to Julie Bergstrom, the only evidence they had that respondent was staying with the Bergstroms was the statement of the Bergstroms' down-

[14] In any event, it was unlikely that the continued presence of "[t]hree or four Minneapolis police squads" would long have gone unnoticed by respondent or curious neighbors. Pet. App. A10-A11. It is well known that a covert stake-out is difficult to implement and maintain. See *United States* v. *Salvador*, 740 F.2d at 758; *United States* v. *Williams*, 612 F.2d at 739.

[15] It is an open question whether a defendant in respondent's position could get evidence suppressed if the police enter the premises of a third party to arrest the defendant, when they have only an arrest warrant for the defendant and not a search warrant for the premises. Compare *United States* v. *Underwood*, 717 F.2d 482, 483-485 (9th Cir. 1983) (no suppression), cert. denied, 465 U.S. 1036 (1984), with *id.* at 486-492 (Skopil, J., dissenting) (suppression required); 4 W. LaFave, *Search and Seizure* § 11.3(b), at 297-298 (2d ed. 1987). What is not subject to question, however, is that an unconsented entry under those circumstances would violate the Bergstroms' rights. If the Minneapolis police wished to avoid violating anyone's rights under the Fourth Amendment, and the circumstances were not exigent, they would not enter the Bergstroms' house with only an arrest warrant.



stairs neighbor, which might well have been insufficient to justify a search warrant for the Bergstroms' home. The action the police took was therefore reasonable, and they did not forgo any readily available line of investigation that could have avoided the warrantless entry to effect respondent's arrest.

## CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Minnesota should be reversed.

Respectfully submitted.

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No. 88-1916

IN THE

# Supreme Court of the United States

October Term, 1989

STATE OF MINNESOTA,

*Petitioner,*

vs.

ROBERT DARREN OLSON,

*Respondent.*

ON WRIT OF CERTIORARI TO THE
MINNESOTA SUPREME COURT

## BRIEF OF THE STATES OF CONNECTICUT, DELAWARE, INDIANA, KANSAS, KENTUCKY, MICHIGAN, MISSISSIPPI, MISSOURI, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VERMONT, VIRGINIA AND WYOMING, NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., NATIONAL SHERIFFS ASSOCIATION, INC., AND MINNESOTA COUNTY ATTORNEYS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONER STATE OF MINNESOTA

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## INTEREST OF AMICI

This brief is submitted by amici pursuant to Sup. Ct. R. 36.2 and 36.4 in support of the State of Minnesota's petition for a writ of certiorari.[1]

The interests of all the amici states are similar. On the first issue, if this Court articulates an explicit set of factors clarifying when a guest in another's home has a legitimate expectation of privacy, it will eliminate the need for prosecutors to revisit continually the same ground in the lower courts. On the second issue, the articulation by this Court of a clear definition of exigent circumstances will give the police much needed guidance about when they can enter a home without a warrant to make an arrest.

The National District Attorneys Association, Inc. (NDAA) is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publications, and amicus curiae activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

The International Association of Chiefs of Police, Inc. (IACP) is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 72 nations. Through its programs of training, publications, legislative reform and amicus curiae advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

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[1] Pursuant to Rule 36.2, written consent of the parties to the filing of the brief by the amici associations is being filed at the same time as this brief. The amici states are sponsored by their respective attorneys general and therefore, pursuant to Rule 36.1, consent for them is not necessary.



The National Sheriffs Association, Inc. (NSA) is the largest organization of sheriffs and jail administrators in America, consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting all rights guaranteed under the Constitution.

The Minnesota County Attorneys Association (MCAA) is the statewide organization representing all felony prosecutors in Minnesota and has some purposes similar to those of the NDAA, with a particular focus on the criminal justice system in Minnesota.

## SUMMARY OF ARGUMENT

### I. Legitimate Expectation of Privacy.

A legitimate expectation of privacy cannot be determined by a "bright line" and must be developed on a case-by-case basis. *Rakas v. Illinois*, 439 U.S. 128 (1978). Lower courts have developed their own, often inconsistent factors. This Court's guidance is needed to achieve greater consistency.

Amici suggest ten factors that may apply in cases where a guest challenges a warrantless entry into someone else's house. Among the more significant factors are: (1) ability to exclude others from the property; (2) possession of a key; and (3) whether the accused has been allowed to stay in the house alone.

### II. Exigent Circumstances.

In order to arrest a suspect, the police may make a warrantless entry into his home or into a third party's home if

there are exigent circumstances. *Payton v. New York*, 445 U.S. 573 (1980); *Steagald v. United States*, 451 U.S. 204 (1981). Exigent circumstances were not present in either *Payton* or *Steagald* and this Court left the initial application of the exigent circumstances exception to the lower courts.

Police officers in the field need a definite, easily understood definition of exigent circumstances so that they know when they can make a warrantless entry. Amici's suggested definition is: (1) hot pursuit, or, (2) specific and articulable facts justifying a belief that (a) the suspect is dangerous, or (b) he may escape, or (c) evidence may be lost. The definition does not explicitly require considering whether the delay in getting a warrant poses a risk that danger, flight, or evidence loss may occur. However, this is unnecessary since, by the very nature of these risks, they will exist and pose a risk as soon as the officer becomes aware of their possible presence. The risk will exist at the time the officer decides whether to make a warrantless entry or obtain a warrant and thus necessarily exists during the delay that would be caused by getting a warrant.

If there are exigent circumstances, the police should not be required to stake out a house and wait for a warrant.



## ARGUMENT

### I. THIS COURT SHOULD ARTICULATE A LIST OF FACTORS FOR LOWER COURTS TO CONSIDER IN DETERMINING WHETHER A GUEST HAS A LEGITIMATE EXPECTATION OF PRIVACY IN SOMEONE ELSE'S HOME.

The Fourth Amendment to the United States Constitution provides that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . ." The Fourth Amendment secures the rights of people in their own houses, not in the houses of others. Therefore, a guest cannot challenge a warrantless entry into another's home unless he has a legitimate expectation of privacy there.

*Rakas v. Illinois*, 439 U.S. 128 (1978) rejected the "bright line" rule of "legitimately on the premises" and held that the question of when a guest has a legitimate expectation of privacy must be developed by a case-by-case analysis. *See* discussion at 439 U.S. 144-48.[2] In the ensuing decade, the lower courts used different factors, accorded the factors different significance, and even attempted to articulate new "bright line" rules. *See* amici brief in support of petition for certiorari at 5-10. Amici respectfully submit that this Court

[2] For example, officers do not need a bright line. Absent exigent circumstances, consent or a warrant, they should not enter a home to arrest a guest anyway, even if the guest lacks a legitimate expectation of privacy. Likewise, if the officers are doubtful about whether the house is the suspect's "home," so that an arrest warrant under *Payton* (445 U.S. at 602-03) instead of a search warrant under *Steagald* (Rehnquist, J., dissenting, 451 U.S. at 231) would suffice, they can, in the absence of any exigency, simply obtain a search warrant.

should articulate a list of factors that should be considered by the lower courts in determining whether a guest has a legitimate expectation of privacy.

**A. The Factors.**

Amici suggest the following factors are appropriate ones to consider:

(1) the ability or right to exclude other persons from the premises;

(2) possession of a key to the premises;

(3) the type of guest that the accused is;

(4) partially paying some of the owner's expenses;

(5) whether the accused was allowed to stay at the premises alone;

(6) the accused's historical (or prior) use of the premises, including the length and frequency of any visits and whether his presence was uninterrupted or sporadic;

(7) the extent of the accused's freedom to use the premises, including whether there were any restrictions on rooms he had access to, or any restrictions on his use of the house's equipment or appliances;

(8) what personal effects of the accused were at the premises, how long they had been there, whether they were just stored there or whether the accused had access to use them on an ongoing basis, and whether they represented most or all of his worldly possessions or just a few miscellaneous items;

(9) the precautions taken by the accused to develop and maintain his privacy in the premises;

(10) the accused's objective expectation of privacy and the reasonableness of that expectation.



**B. Discussion Of Factors.**

1. *Ability to Exclude Others.* As this Court said in *Rakas*:

> One of the main rights attaching to property is the right to exclude others, *see* W. Blackstone, *Commentaries* Book 2, ch. 1, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude.

439 U.S. at 144, n. 12. If one can exclude all others, one's expected level of privacy is significant.

The ability to exclude others, however, should not be confused with the ability of the guest to entertain his own guests. The ability to admit others does not add to privacy. If anything, it diminishes privacy.

2. *Possession of Key. Rakas* observed that the accused in *Jones v. United States*, 362 U.S. 257 (1960) clearly had a legitimate expectation of privacy in his friend's apartment. *Rakas* noted that, among other things, Jones had a key to the apartment that he let himself in with. *See* 439 U.S. at 149. Owners[3] have keys; mere guests do not. Possession of a key allows one to come and go as one pleases. It lets the guest exclude others when the owner is not present. However, if a guest does not possess a key, his comings and goings are often dictated by the schedule of the house's owner.

3. *Type of Guest.* Guests range from a salesman to an adult child who has been temporarily living in his parents' house for a few months. Persons not actually living there, such as tradesmen, dinner guests or party guests, would have little likelihood of any privacy expectation. And someone not living there who did have an expectation, such as the accused in

[3] "Owner" in this discussion (at 7 to 11) includes leasors, renters and similar persons.

*Jones*, would need to have many of the other factors supporting this expectation.

4. *Helping with Expenses.* A guest is unlikely to have any ownership interest in the property. However, if he helps the owner pay items such as the utility bills, rent, or mortgage payments, this could help support an expectation of privacy.

5. *Staying Alone in the House.* The accused in *Jones*, who had a legitimate expectation of privacy, was allowed extensive use of the apartment while the owner was away. When the owner allows the guest to remain in the house alone, this not only affords the guest the privacy normally associated with solitude, but also is an indication that the guest is more like "one of the family" than a casual guest.

6. *Prior Use of Premises.* When a guest has actually been living in the house, the length and continuity of his presence may indicate whether he is analogous to a regular tenant instead of a mere guest. *See* (in another context) *Steagald v. United States*, (Rehnquist, J., dissenting) 451 U.S. 204, 230-31 (1981):

> If a suspect has been living in a particular dwelling for any significant period, say a few days, it can certainly be considered his "home" for Fourth Amendment purposes. . . . [and] the police could enter the premises with only an arrest warrant.

(In *Steagald*, however, the minimum of four days that the DEA agents believed Lyons had been staying in Steagald's residence—*see* 451 U.S. at 206—was not sufficient to make it Lyon's "home.")

7. *Restrictions.* If the guest is not allowed access to certain areas of the house, or is not permitted to do things such as help himself to the contents of the refrigerator, his expectation of privacy is not very high.



8. *Personal Effects.* A guest who has moved in lock, stock and barrel differs from one who remains overnight with nary a toothbrush. While the number of one's worldly possessions has nothing to do with a legitimate expectation of privacy, their location indicates whether the premises is equivalent to one's own home.

9. *Precautions to Maintain Privacy.* Precautions taken by a guest to maintain his privacy may depend upon how much freedom the owner allows him. Attempts to maintain privacy may be prevented by the owner, and thereby lower a guest's expectation of privacy.

10. *Objective Expectation of Privacy.* Sometimes offhand comments by the suspect (such as complaining about the fact that the owner will not give him a key, doesn't trust him in the house alone, and limits his time in the bathroom) could all be objective manifestations of a lack of any subjective expectation of privacy.

Some courts have suggested that the ownership, use or control of seized property should be a factor in deciding whether the person has a legitimate expectation of privacy. *E.g.*, *United States v. Haydel*, 649 F.2d 1152 (5th Cir., 1981). However, it should not be a factor in determining a privacy expectation in another's home.[4] For example, defendants A and B could both be guests under identical circumstances and use and keep identical personal property on the premises. That being the case, the seizure of A's, but not B's, property should not make any difference in determining whether either had a legitimate expectation of privacy in the premises.

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[4] Mere ownership, possession or use of seized property, does not necessarily mean that the person has a legitimate expectation of privacy. *Rawlings v. Kentucky*, 448 U.S. 98 (1980); *United States v. Salvucci*, 448 U.S. 83, 92 (1980).

An accused who has no privacy expectation in another's home may have a privacy expectation in personal property (such as a briefcase) that he has with him, just the same as if he were carrying the briefcase in a public place or in open fields. But the seizure of the briefcase should not give the accused a legitimate expectation of privacy in another's home, any more than it would give him an expectation of privacy in an open field or in a public place.

## II. DEFENDANT IN THIS CASE HAD NO LEGITIMATE EXPECTATION OF PRIVACY.

The record in this case affords an opportunity to apply the above factors in a concrete situation.

1. Defendant had no ability to exclude anyone, since the matter was never discussed. 2. He had no key. 3. Defendant was a very temporary guest who was sleeping on the floor. (The real reason for his presence was of course that he was hiding from the police.) 4. He was not helping with the rent payments. 5 and 7. It is unclear whether he was allowed the run of the house or not, but it is clear that he was never allowed to stay there alone. 6. He had only stayed there one night and had slept on the floor. 8. He had only a change of clothes with him and not even a toothbrush. 9. It does not appear that he took any precautions to protect his privacy. 10. There is no indication that defendant believed he had any privacy interest in the Bergstrom's duplex. In short, he had no legitimate expectation of privacy.

Deciding this case is clear cut and does not require any balancing or ranking of the factors. However, the more those factors have in common with ownership, the more importance they should have. These would include: (1) the ability to exclude, (2) the possession of a key, (3) being allowed to be in



the premises alone, (4) having unrestricted use of the premises, (5) living in the premises for a significant, uninterrupted length of time, and (6) maintaining (and using) at the residence a significant portion of one's worldly goods would be such factors. The first three of them would, consistent with *Jones*, be among the more important.

Finally, if a guest has a legitimate expectation of privacy, he will in some respects be comparable to a resident member of the family and may be able to consent to a search of the premises. *See United States v. Karo*, 468 U.S. 705, 724 (1984) (O'Connor, J., concurring). It could also result in an arrest warrant for the accused, instead of a search warrant for the premises, sufficing to justify a nonconsent, nonexigent entry to arrest the guest. *See Steagald v. United States*, (Rehnquist, J., dissenting) 451 U.S. at 230-31. Thus, extending Fourth Amendment protection to a guest may concommitantly diminish the degree of privacy accorded the owner.

## III. POLICE OFFICERS NEED CLEAR GUIDANCE ABOUT WHAT EXIGENT CIRCUMSTANCES ALLOW WARRANTLESS ENTRIES INTO A HOME TO MAKE A WARRANTLESS ARREST.

*Payton v. New York*, 445 U.S. 573 (1980) held that, absent exigent circumstances, the Fourth Amendment prohibits warrantless arrests of a suspect in his own home. *Payton* left "to the lower courts the initial application of the exigent-circumstances exception." *Welsh v. Wisconsin*, 466 U.S. 740, 749 (1984).

Mr. Justice White's dissent in *Payton* predicted that as a result of that case:

> The policeman on his beat must now make subtle discriminations that perplex even judges in their chambers.
>
> . . .

> Further, police officers will often face the difficult task of deciding whether the circumstances are sufficiently exigent to justify their entry to arrest without a warrant. This is a decision that must be made quickly in the most trying of circumstances. If the officers mistakenly decide that the circumstances are exigent, the arrest will be invalid and any evidence seized incident to the arrest or in plain view will be excluded at trial. On the other hand, if the officers mistakenly determine that exigent circumstances are lacking, they may refrain from making the arrest, thus creating the possibility that a dangerous criminal will escape into the community.

445 U.S. at 618-19. An explicit definition, easily understood by police officers, is needed to cure this situation.

Officers should have guidance about exigent circumstances that has the same degree of certainty that custodial interrogation and warrantless searches of vehicles do. *See Miranda v. Arizona*, 384 U.S. 436 (1966) and *United States v. Ross*, 456 U.S. 798 (1982). As Professor LaFave has observed:

> The ultimate purpose of all Fourth Amendment standards is not to keep probative evidence out of criminal trials, but rather to keep police practices within constitutional limits, and this purpose is not served by a rule which cannot be applied correctly with a fair degree of consistency by well-intentioned police officers.

W. LaFave, Vol. 2, *Search and Seizure*, 599 (1987); quoted with approval in Donnino and Girese, *Exigent Circumstances for a Warrantless Home Arrest*, 45 Alb. L. Rev. 90, 112 (1980).

Donnino and Girese, and at least one other commentator, have opined that exigent circumstances cannot be determined by a bright line. 45 Alb. L. Rev. at 115; Note, 6 Hamline L. Rev. 191, 207 (1983). However, both irrelevantly rely on Mr. Justice Powell's concurring opinion in *Rakas v. Illinois*, 439 U.S. 128, 155-56 (1978), which questioned the efficacy of a bright line for a legitimate expectation of privacy, but did not question the efficacy of a bright line for exigent circumstances.



## IV. SUFFICIENT GUIDANCE FOR OFFICERS DOES NOT EXIST.

It appears to be generally acknowledged that exigent circumstances are present in the four following types of situations, although not all of them have been explicitly adopted by this Court:

(1) Hot pursuit: *United States v. Santana*, 427 U.S. 38 (1976); *Welsh v. Wisconsin*, 466 U.S. at 750; *Steagald v. United States*, 451 U.S. 204, 221 (1981); *Michigan v. Tyler*, 436 U.S. 499, 509 (1978); *see also*, Donnino and Girese, 45 Alb. L. Rev. at 94-95; Note, 23 Ariz. L. Rev. 1171, 1175 (1981); Note, 62 U. Det. L. Rev. 319, 322 (1985); Note, 6 Hamline L. Rev. at 200 (1983).

(2) Suspect poses danger to officers or citizens: *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967); *see also*, Harbaugh and Faust, *Knock on Any Door—Home Arrests after Payton and Steagald*, 86 Dick. L. Rev. 191, 222, 231 (1982); Donnino and Girese, 45 Alb. L. Rev. at 96; 23 Ariz. L. Rev. at 1180; 62 U. Det. L. Rev. at 323.

(3) Suspect is likely to escape or avoid arrest: *Johnson v. United States*, 333 U.S. 10, 15 (1948); *see also*, Donnino and Girese, 45 Alb. L. Rev. at 96; Harbaugh and Faust, 86 Dick. L. Rev. at 222, 232; 23 Ariz. L. Rev. at 1182; 62 U. Det. L. Rev. at 322.

(4) There is a likelihood that evidence will be lost or destroyed: *Welsh v. Wisconsin*, 466 U.S. at 750; *Michigan v. Tyler*, 436 U.S. at 509; *Schmerber v. California*, 384 U.S. 757, 770 (1966); *Santana* (Stevens, J., concurring), 427 U.S. at 44; *Santana* (Marshall, J., dissenting), 427 U.S. at 45-48; *see also*, Donnino and Girese, 45 Alb. L. Rev. at 96; Harbaugh and Faust, 86 Dick. L. Rev. at 223 and 232; 23 Ariz. L. Rev. at 1177; 62 U. Det. L. Rev. at 322-23.

The challenge is to articulate these exigencies in a form that can be easily used by officers on the street.

### A. *Dorman v. United States* Does Not Provide Sufficient Guidance.

*Dorman v. United States*, 435 F.2d 385 (D.C. Cir. 1970), in upholding a warrantless entry to arrest on exigent circumstances, considered a list of seven factors. These seven factors were:

(1) a grave offense is involved, particularly one that is a crime of violence;

(2) the suspect is reasonably believed to be armed;

(3) there is more than the minimum amount of probable cause;

(4) strong reason to believe the suspect is in the premises;

(5) a likelihood the suspect will escape if not swiftly apprehended;

(6) the entry was made peaceably; and

(7) the time of day at which the entry is made.

435 F.2d at 392-93.

*Dorman* has been widely cited and followed in the lower courts although some have expressed reservations. *E.g.*, Donnino and Girese, 45 Alb. L. Rev. at 100, n. 49, and at 106.



*Welsh v. Wisconsin* said that "[w]ithout approving all of the factors," *Dorman* was "a leading federal case defining exigent circumstances." 466 U.S. at 751-52.

On the other hand, LaFave says:

> It is thus appropriate to ask whether the *Dorman* rule is too sophisticated to be so applied [by police officers on the scene], requiring as it does the making of on-the-spot decisions by a complicated weighing and balancing of a multitude of imprecise factors.

LaFave, 2 *Search and Seizure* at 599-600. For example, how can an officer decide when one-half of the factors favor the state and one-half favor the accused. *See* LaFave, 2 *Search and Seizure* at 600. Many other commentators have cited LaFave and agree with him. Donnino and Girese, 45 Alb. L. Rev. at 104; Harbaugh and Faust, 86 Dick. L. Rev. at 224-25; 23 Ariz. L. Rev. at 1174; 6 Hamline L. Rev. at 203; *Note*, 13 N.M.L. Rev. 511, 521 (1983); and 58 U. Det. J. Urb. L. 545, 555 (1981).

### B. Other Definitions Also Have Drawbacks.

Although *Dorman* is the best known, other methods, including the following definitions, have also been suggested for determining whether exigent circumstances are present:

> In this context, "exigent circumstances" means an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence.

*People v. Ramey*, 16 Cal. 3d 263, 276, 545 P.2d 1333, 1341, 127 Cal. Rptr. 629, 637 (1976).

> [E]xigent circumstances . . . exist when a reasonably prudent man in the circumstances would be warranted in the belief that delay incident to securing the warrant would pose a significant risk of danger to life or property, of the escape of the suspect, or of the destruction of evidence.

Donnino and Girese, 45 Alb. L. Rev. at 114.

> [Exigent circumstances exist when] the officer (a) has probable cause to believe that a delay to procure an appropriate warrant will gravely endanger the officer or another person, or result in the destruction or removal of evidence or the escape of the suspected felon, and (b) enters or attempts to enter the home where the person is believed to be in a reasonable manner within the time it would have taken him to procure an appropriate warrant under the then existing circumstances.

Harbaugh and Faust, 86 Dick. L. Rev. at 226. Each definition limits exigent circumstances to danger, flight or loss of evidence. However, other elements in the definitions make them unsuitable as guidance for police officers.

The Donnino and Girese and the Harbaugh and Faust definitions emphasize the delay incident to securing a warrant. This has the effect of subordinating and very likely obscuring the significance of the suspect's dangerousness, likelihood of escape or destruction of evidence.

Focusing on the delay incident to securing a warrant is unnecessary. Yet the definitions implicitly suggest to officers that the delay must somehow be responsible for creating the risk.

The articulation of this element in the definition may also cause officers to believe they must predict with precision both



the amount of time it will take to find a judge to sign a warrant and also just exactly what the suspect will do while the officer is away obtaining a warrant. In fact, Harbaugh and Faust would require a belief that the suspect definitely *will* escape or destroy evidence.

Moreover, the type of individual involved is usually unpredictable. This unpredictability, in fact, may often contribute to the exigency of the situation.

Harbaugh and Faust also recommend that, even if there are exigent circumstances, warrantless entries should be permitted only from the time officers obtain probable cause until the time that it would normally take to obtain a warrant. 86 Dick. L. Rev. at 226-27. In effect, this proposal requires an officer to interrupt his investigation immediately after he obtains probable cause and apply for a warrant. This proposal should not be adopted.

First, officers are not required to obtain an arrest warrant and arrest a suspect as soon as they obtain probable cause. *See, e.g., United States v. Watson*, 423 U.S. 411, 431, 449 (Powell, J., concurring and Marshall, J., dissenting); LaFave, 2 *Search and Seizure* at 170.

Second, it would require an officer to interrupt his investigation and possibly miss opportunities to locate additional witnesses or evidence. This is not favored. *See Schmerber v. California*: "Particularly . . . where time had to be taken . . . to investigate . . ., there was no time to seek out a magistrate and secure a warrant." 384 U.S. at 770-71. *See also, Payton v. New York*, (White, J., dissenting) at 445 U.S. 619; and LaFave, 2 *Search and Seizure*, at 608.

*Ramey* says that its definition, which is endorsed at 13 N.M.L. Rev. 524, is not a litmus test for the presence of exigent circumstances. 16 Cal. 3d at 276, 545 P.2d at 1341, 127

Cal. Rptr. at 637. As such, it fails to provide sufficient guidance for officers.

Unlike Donnino and Girese and Harbaugh and Faust, *Ramey's* definition does not explicitly mention the risk posed by the delay of obtaining the warrant, but it does require a showing that the danger, flight or destruction of evidence is imminent. Danger, flight and destruction of evidence are, by their very nature, imminent. Using "imminent" in the definition implies that these events must somehow be even more imminent than they usually are and may confuse officers and the lower courts.

The same could be said about *Ramey's* inclusion of "swift action" and "emergency situation" in addition to "imminent." Certainly any action to prevent an imminent danger will necessarily be swift. Therefore, including "swift" in the definition implies that it must be even swifter. "Emergency situation" possibly implies that there must be even more of an emergency than, for example, a danger to life. At best, it is redundant, circular, and confusing, since exigent circumstances are, by definition, an emergency.

### C. LaFave's Proposal.

LaFave suggests that "a solution is most likely to be found by distinguishing the truly 'planned' arrest from the arrest which is made in the course of an ongoing investigation in the field." LaFave, 2 *Search and Seizure* at 600. The approach makes sense. LaFave's "field arrest" would often occur when the risk of flight or destruction of evidence is at its greatest. A good example is *Dorman*, in which the officers "engaged steadily and systematically in the identification and pursuit of the criminal suspects." *Dorman*, 435 F.2d at 394.



If LaFave's approach is adopted, officers would need a "bright line" between a planned arrest and an arrest in the field, such as the following: If the police decide to arrest a suspect, and promptly arrest him, it would be a "field arrest." However, it would be "planned" if they postponed the arrest because it was not urgent and could be done later. LaFave would also allow a warrantless arrest in the "planned arrest" situation if an exigency subsequently arose. *See* LaFave, 2 *Search and Seizure* at 601.

Unfortunately, it appears possible that some "field arrests" may be "routine arrests." If LaFave's approach would not satisfy the Fourth Amendment under all circumstances, its value to officers would diminish.

## V. AMICI'S PROPOSED DEFINITION OF EXIGENT CIRCUMSTANCES WILL SATISFY CONSTITUTIONAL REQUIREMENTS, AND PROVIDE HELPFUL GUIDANCE FOR THE POLICE.

Amici suggest that the following definition of exigent circumstances should be used and applied by this Court:

> Except as limited by *Welsh v. Wisconsin*, police officers may make a warrantless arrest of a suspect in his or another's home when any of the following are present:
>
> 1. There is hot pursuit.
>
> or
>
> 2. An officer is aware of specific and articulable facts justifying a belief that:
>
> a. A suspect is a danger to life, may injure someone, or may cause serious damage to property.
>
> or
>
> b. A suspect may flee or avoid arrest.
>
> or
>
> c. Evidence may be lost, removed or destroyed.

### A. This Definition Accurately Articulates Exigent Circumstances That Allow A Warrantless Arrest In A Home.

1. The definition is based upon the well-established doctrines of exigent circumstances discussed *supra* at 13-14. However, unlike many of the authorities and commentators cited there, the proposed definition's three grounds of danger, escape and destruction of evidence do not explicitly articulate any requirement that the delay incident to obtaining a warrant would pose a significant risk. That requirement was not included in order to provide better guidance for police officers. And, as demonstrated by the following discussion, its inclusion was not necessary to satisfy the requirements of the Fourth Amendment.

If the police believe a suspect is dangerous, they believe he is dangerous then and there. They do not believe that he is presently gentle and passive and poses no threat until some time in the future. The suspect is like boiling water that may burn someone at any minute, not like water that has just been put on the stove and has yet to come to a boil.

Likewise, if a suspect wishes to escape or destroy evidence, those actions must, by their very nature, be accomplished rapidly if they are to be effective. Therefore, defendants normally flee or destroy evidence as soon as they perceive the necessity of it and can conceive a plan to accomplish it.

For example, if an officer believes that a suspect is a danger to life, that danger exists at the very moment the officer enters the home without a warrant. If the danger exists then, *a fortiori* the danger would exist during the delay necessary to obtain a warrant. If the officer had decided to seek a warrant, it would have been with the knowledge that the danger could erupt before he was able to type the first word on the warrant application.



2. The proposed definition is consistent with exigent circumstances decisions by this Court. *Johnson v. United States*, 333 U.S. 10 (1948) ruled that the search of the defendant's home in a residential hotel violated the Fourth Amendment because "no suspect was fleeing or likely to take flight" and "no evidence or contraband was threatened with removal or destruction." 333 U.S. at 15. Nor was there hot pursuit or any danger. The proposed definition would reach the same result: no exigent circumstances.

*Warden v. Hayden* held that there were exigent circumstances. Applying the proposed definition to *Warden* would have the same result because exigent circumstances of danger, escape, and loss of evidence were all present. (Loss of identification evidence was a ground because only a speedy search "could have insured that Hayden was the only man present" in the house to which the male armed robber had fled just minutes before. 387 U.S. at 299.)

*Ker v. California*, 374 U.S. 23 (1963), *United States v. Santana* and *Welsh v. Wisconsin* would also have reached the same results if the proposed definition would have been used.

### B. The Proposed Definition Provides Specific, Helpful Guidance For Police Officers.

The four different, independent grounds should be relatively easy to remember. All are logical and grounded in common sense; for example, if a suspect is on the verge of fleeing, it makes sense to arrest him immediately.

Since the definition does not require an officer to speculate either about how long it might have taken to get a warrant or about what the suspect would do in the meantime, it allows them to base their decision upon known facts rather than upon attempting to predict the future. *See also*, discussion *supra* at 16-17.

The *Welsh* caveat in the proposed definition will require case-by-case determinations for extremely minor offenses. However, that adds nothing to the analysis that *Welsh* currently requires.[5]

### C. The Scope Of "Hot Pursuit."

A hot pursuit "means some sort of a chase, but it need not be an extended hue and cry 'in and about [the] public streets.'" *United States v. Santana*, 427 U.S. at 43.

Therefore, warrantless entries "in the nature of a hot pursuit" but in which there is no chase are not covered by hot pursuit in the proposed definition. (*See State v. Chavez*, 98 N.M. 61, 64, 644 P.2d 1050, 1053 (Ct. App. 1982), *rev. denied*, 98 N.M. 336, 648 P.2d 794 (1982)). However, if it is a non-routine arrest, it is probably covered by another ground of the proposed definition, such as flight or destruction of evidence. A good example is *Warden v. Hayden*, briefly discussed *supra* at 21, which has been mentioned in passing as a hot pursuit case. *See Michigan v. Tyler*, 436 U.S. at 509.

### D. The "Specific And Articulable Facts" Standard of *Terry v. Ohio* Should Be Used.

This Court has apparently never ruled on whether officers need specific and articulable facts, under *Terry v. Ohio*, 392 U.S. 1 (1968), or the higher standard of probable cause, that exigent circumstances are present. *Welsh v. Wisconsin*,

[5] *Welsh* "will necessitate a case-by-case evaluation of the seriousness of particular crimes, a difficult task for which officers and courts are poorly equipped." *Welsh v. Wisconsin*, (White, J., dissenting) 466 U.S. at 761-62.

However, this case, a first-degree murder conviction, is not an appropriate vehicle in which to reverse *Welsh*.



(White, J., dissenting) mentioned "*probable cause* to believe that the delay involved in procuring an arrest warrant will gravely endanger the officer . . . ." 466 U.S. at 759. (Emphasis added.) However, the specific and articulable facts standard of *Terry v. Ohio* is sufficient. First, the police would still need probable cause that the suspect had committed the crime in order to arrest him. Second, the use of the *Terry v. Ohio* language is limited and applies to three specific types of emergencies (danger, flight, and destruction of evidence) and to no others.

The specific and articulable facts should, of course, include knowledge gained by the officer in previous cases. *See United States v. Sokolow*, —— U.S. ——, 109 S. Ct. 1581 (1989).

The officer's belief should be evaluated only on the basis of information that was available to him. *E.g., Ramey*, 16 Cal. 3d at 276, 545 P.2d at 1341, 127 Cal. Rptr. at 637.[6]

Some courts have held that there cannot be exigent circumstances unless "the officers reasonably believe that [the accused] either knew or was in substantial danger of learning of his imminent capture." *United States v. George*, 883 F.2d 1407, 1414 (9th Cir. 1989). This should not be required. First, officers are unlikely to be privy to what a suspect knows. Second, a suspect who has recently committed a crime may flee or destroy evidence regardless of whether he thinks the police suspect him. In fact, this is precisely the sort of possibility that is present in those situations that are "in the nature of (but not quite) hot pursuit," which are discussed *supra* at 22.

[6] *James v. Superior Court*, 87 Cal. App. 3d 985, 151 Cal. Rptr. 270 (1979), on the other hand, held that there were not exigent circumstances because the defendant was asleep. However, the officers did not know this. (Moreover, one can wake up, even in the middle of the night, and flee or destroy evidence.)

### E. The Police Should Not Be Required To Stake Out A Home While They Obtain A Warrant.

Some courts have held that, instead of entering a house without a warrant to make an arrest, the officer should guard or "stake out" the house until a warrant can be obtained. *E.g.*, *State v. McNeal*, 251 S.E.2d 484 (W. Va. 1978), (discussed by Donnino and Girese at 45 Alb. L. Rev. 108-09).

However, a stake out does not prevent the defendant from destroying evidence inside the house. Nor does it necessarily make him any less of a danger. As LaFave points out, a stake out can increase the risk to a hostage, undercover agent or informant who is inside. It also gives the suspect more time to prepare a violent resistance. *See* 2 *Search and Seizure* at 605-06.

A stake out leaves the rest of the public that much more unprotected. As observed in *Steagald v. United States* (Rehnquist, J., dissenting) 451 U.S. at 225-26,

> [W]hile "[t]he police could reduce the likelihood of escape by staking out all possible exits . . . the cost of such a stake-out seems excessive in an era of rising crime and scarce police resources." *Payton v. New York, supra* at 619, 100 S. Ct. at 1397 (White, J., dissenting).

The Fourth Amendment does not require the police to secure a car and wait for a search warrant. *See Arkansas v. Sanders*, 442 U.S. 753, 765, n. 14 (1979). When there are exigent circumstances, it would make even less sense to require police to attempt to surround and seal off a home while they send one of their number to obtain a warrant. *See* Donnino and Girese, 45 Alb. L. Rev. at 112, n. 111.

*Payton* applies only to routine arrests. If a stake out is necessary, it is not a routine arrest.



### F. Even If Police Activity Contributes To The Exigency, A Warrantless Entry And Arrest Should Be Allowed.

Officers should not be required to obtain a warrant as a hedge against the possibility that an exigency may arise in the future. *See* discussion *supra* at 16-18. Some cases, however, have held that, when police activity is responsible for the exigency, a warrantless entry should not be allowed. *See United States v. Santana*, (Marshall, J., dissenting) 427 U.S. at 45-49; *State v. Canby*, 252 S.E.2d 164 (W. Va. 1979); *James v. Superior Court*, 87 Cal. App. 3d 985, 151 Cal. Rptr. 270 (1979).

For example, it is not uncommon for police to interview friends and relatives of suspects. If one of them decides to warn the suspect, the suspect should not be able, for example, to destroy evidence unimpeded while the police are powerless to enter. *See Canby*. Nor should police be discouraged from checking to see if a suspect is in his motel room. *See James*. If it turns out he is not there, valuable time will be lost that could have been used to find out where he actually was.

Some cases would apply this rule only if an officer deliberately fomented an exigency to save the time and bother of a warrant. *See Santana*, (Marshall, J., dissenting) 427 U.S. at 48-49. While this limited approach is more justifiable than the foregoing unrestricted one, there is little likelihood of any such police practice being widespread. No prudent officer would try it because, warrantless entry or not, he could well end up with no evidence and a dangerous criminal at large.

In the final analysis, it must be remembered that it is the suspect, the crimes he committed, his other activities, and his propensities, not the police, that create the exigency.

### G. One Type Of Exigency Is Sufficient.

One commentator has suggested that more than one type of exigency should be present before the police can make a warrantless arrest. 13 N.M.L. Rev. at 515. This suggestion should be rejected. For example, a drug dealer who is about to flush his contraband into the sewer is not a danger. And, after he flushed it, he would not need to flee.

### H. There Were Exigent Circumstances To Arrest Defendant.

Applying the proposed definition to the facts of this case is a straightforward matter—as well it should be if the definition is to help guide the police. First, the officers had specific and articulable facts to support a belief that defendant was dangerous: he was the getaway driver in a robbery/murder; the robbery was part of a string of robberies; and it was likely that defendant was armed. (Even though the murder weapon had been seized, criminals frequently have more than one gun.)

In addition, the officers had specific and articulable facts to support a belief that defendant might flee or avoid arrest: defendant fled when the police stopped his car; defendant precipitously abandoned his own home and was hiding out at the Bergstroms; and the police had a tip that he was planning to leave town.



## CONCLUSION

This Court should articulate the factors to consider in determining whether a guest has a legitimate expectation of privacy in someone else's home. It should also articulate a definition of exigent circumstances that can be easily understood and applied by the officers in the field. Applying respectively the factors and definition suggested by amici requires that the decision of the Minnesota Supreme Court be reversed.

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